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No. 86-_____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

JUDY F. STICKLEN, JAMES L. DEGER
and FREDERICK H. CRANFORD,
Petitioners,

v.

CITY OF MIDDLETOWN, OHIO,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

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QUESTIONS PRESENTED

I. Whether the courts should entertain a challenge by a city's elected officials to the constitutionality of an ordinance proposed by initiative petition and adopted by the electorate of the City, when the municipal corporation suffered no harm as a result of the ordinance and when, at the time the challenge was brought, any harm which might have occurred was moot?

II. Whether an ordinance proposed by initiative petition, and adopted by a vote of the electors, which repeals all legislation and commitments of the city concerning a contract with the Ohio Department of Transportation for the city's cooperation in the widening and improving of a street within the municipality is merely a repudiation of the contract which fails to unconsitutionally impair the city's contractual obligations?

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CITY OF MIDDLETOWN, OHIO,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

Petitioners, Judy F. Sticklen, James L. Deger and Frederick H. Cranford, respectfully request that a Writ of Certiorari be issued to review the decision and judgment of Supreme Court of Ohio entered on July 23, 1986, which affirmed the decision of the Court of Appeals of Butler County, Ohio and of the Court of Common Pleas of Butler County, Ohio, granting judgment in favor of the Respondent.

OPINIONS BELOW

The opinion of the Supreme Court of Ohio is contained in the Appendix at 1a, and is reported at 25 Ohio St. 3d 71, 495 N.E. 2d 380. The opinion of the Court of Appeals for Butler County, Ohio, is contained in the Ap-

pendix at 33a, and is unreported. The opinion of the Court of Common Pleas of Butler County, Ohio, is contained in the Appendix at 63a, and is unreported.

JURISDICTION

The judgment of the Supreme Court of Ohio was entered on July 23, 1986. Jurisdiction to review the judgment of the Supreme Court of Ohio in this cause by Writ of Certiorari is conferred on this Court by 28 U.S. Code Sec. 1257(3).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article I, Section 10, U.S. Constitution:

> "No State shall . . . pass any . . . Law impairing the Obligation of Contracts."

Ordinance of the City of Middletown, Ohio (proposed by initiative petition and adopted at the general election held on November 3, 1981):

> "BE IT ORDAINED BY THE PEOPLE OF MIDDLETOWN, OHIO:
>
> "**Section I.** That Resolution No. R81-03 and Ordinance Nos. 081-44 and 081-49 and, in addition, any and all further legislation not herein specifically designated by number but adopted by the City Commissioners of Middletown, Ohio and having reference to the widening and improvement of Manchester Road from Breiel Boulevard east to the Butler/Warren County line, be and hereby are, repealed.

"**Section II.** That any and all commitments of the City of Middletown, Ohio to widen and improve Manchester Road from Breiel Boulevard east to the Butler/Warren County line be, and hereby are, repealed.

"**Section III.** That this ordinance shall take effect and be in force from and after the earliest date allowed by law."

STATEMENT OF THE CASE

A. Procedural Posture

On July 12, 1983, Respondent, the City of Middletown, Ohio, filed a complaint for the validation of securities pursuant to Sec. 133.71, *et seq.*, of the Ohio Revised Code, in the Court of Common Pleas of Butler County, Ohio. The complaint sought a validation of municipal bonds which the city intended to issue to recoup the city's payment of its financial obligation on a municipal development project which widened Manchester Road from a two-lane rural highway within the city of Middletown to a five-lane divided highway between Breiel Boulevard and the eastern boundary of the municipal corporation. The bonds issued by the city were then to be retired through special assessments levied against the owners of property bounding or abutting that portion of Manchester Road which had been developed.

A bench trial was held on August 16, 1983. Most of the evidence was submitted via a joint stipulation of facts and designation of exhibits. Oral testimony was also received.

In an opinion dated March 1, 1984, the Butler County Common Pleas Court held that the securities would be valid despite the adoption, by the electors of the city, of an ordinance proposed by an initiative petition which repealed all legislation dealing with the Manchester Road project. The trial court found that this initiated legislation was unconstitutional, even though no contract of the city had been impaired, because the intent of the legislation was to impair the contract and this unconstitutional intent could not be severed from the constitutional portions of the ordinance. The trial court also held that the city had standing to contest the consitu-

tionality of the initiated ordinance by virtue of the statutory bond validation procedures which gave to the city, as potential issuer of the bonds, the right to raise all issues affecting the validity of the bonds.

On April 29, 1985, the Court of Appeals of Butler County affirmed the trial court's judgment but additionally held that the initiated ordinance had, in fact, impaired the city's existing contractual obligations and was therefore unconstitutional. A timely notice of appeal to the Supreme Court of Ohio was filed, and the motion to certify was allowed on September 25, 1985.

After briefing and argument, the Supreme Court of Ohio rendered its opinion and judgment on July 23, 1986, affirming the judgments of the court of appeals and of the trial court. In its opinion, the Supreme Court of Ohio specifically held that the initiative ordinance "impaired the obligations of the contract between the city and ODOT [Ohio Department of Transportation] in violation of Section 10, Article I of the United States Constitution and was thus void as of its effective date." 25 Ohio St. 3d at 74.

A. Statement of Facts

On May 10, 1977, the Middletown City Commission passed legislation directing the city administration to begin the process leading to the improvement of Manchester Road. The proposed project would widen Manchester Road from two lanes to four lanes, commencing at its intersection with Breiel Boulevard and continuing to easterly corporation limits of the city. The estimated cost of the project was approximately $1,185,000.00; 70% of which would be paid by federal highway funds and the balance to be paid by the city. The city planned to finance most of its share by special assessments against abutting property owners.

On May 2, 1978, the city commission adopted legislation authorizing a contract with the Ohio Department of Transportation ("ODOT"), to perform the actual construction work on the project. This contract was necessary because ODOT was the recipient of the federal highway funds designated for the project and under Ohio law, ODOT was required to enter into a contract with the city to spend the federal highway funds on the project. *See, Ohio Rev. Code* Sec. 5521.01. Included within the ordinance were provisions providing for the city to pay 100% of the cost of the project less any federal funds determined to be eligible and available for participation in the project. The city also agreed to assume responsibility for the maintenance and operation of the project upon its completion.

Between May, 1978, and June, 1981, the City Commission adopted five other pieces of legislation dealing with the project and the special assessments. All five were adopted as emergency measures, thus protecting them from attack by referendum under Ohio law.

On June 9, 1981, a copy of a proposed initiative ordinance was filed with the clerk of the city commission. On June 23, 1981, the city commission adopted a resolution which approved the final plans and arrangements for the project and also included the appropriation of $332,355.00, from the city's general fund, to be paid to ODOT as the city's share of the construction cost. On that same date, a new contract for the project was executed between the city and ODOT and the city's share of the cost paid.

On July 17, 1981, initiative petitions were filed with the city calling for a vote on the proposed initiative ordinance at the next regular election on November 3, 1981, to determine whether to enact the ordinance. The

required number of signatures on the initiative petitions were validated by the board of elections on July 24, 1981, and the initiative ordinance was placed on the ballot for the November election.

On July 21, 1981, ODOT opened the bids for the construction phase of the project and awarded a contract to SK Construction Company on July 27. The actual construction of the project commenced almost immediately.

On November 3, 1981, the citizens of Middletown, by a tally of 5,230 to 3,406, voted to adopt the initiative ordinance. The initiative ordinance went into effect on November 10, 1981. On November 9, 1981, 59.6% of the construction phase was completed. Work on the project continued despite the passage of the initiative ordinance. By July 1, 1982, the project was 100% completed. The actual project cost was $1,330,000.00, 75% of which was paid by federal funds and 25% was actually paid by the city. The city paid its portion of the project cost from a special fund containing the city's share of motor vehicle registration fees.

On July 7, 1983, the city adopted ordinances authorizing the levying of the special assessments to recover the city's portion of the construction cost from the abutting property owners, and to issue bonds in anticipation of the collection of the special assessments. The adoption of these ordinances, in light of the initiative ordinance adopted by the voters of Middletown, prompted the city's complaint seeking a determination of its authority to issue the bonds as well as the levying of the special assessments.

All of the legislation adopted by the City Commission in relation to this project was adopted as emergency legislation. Under Ohio law, legislation passed as an emergency measure is insulated from direct electoral attack by way of a referendum.

ARGUMENT

I. REASONS FOR ALLOWANCE OF THE WRIT OF CERTIORARI.

The fundamental issue in this case is a dispute between the voters of a municipality and their elected representatives over who exercises paramount control over the affairs of the municipal corporation. The immediate issue, however, is whether the contract clause may be used by the elected officals as a weapon to gain the upper hand in this struggle.

The Constitution of Ohio recognizes that all political power is inherent in the people and reserves to the people the right to control the legislative process through the initiative and referendum. Ohio law also provides that an ordinance passed by a municipal legislative body as an emergency measure may not be attacked by way of a referendum, which is a direct electoral assault on the legislation. Rather, the only method available to the electorate to contest emergency legislation is to collaterally attack the offensive legislation by seeking to repeal it through subsequent legislation proposed by initiative petition. *State, ex rel. Sharpe* v. *Hitt*, 155 Ohio St. 529 (1951).

This scenario is exactly what transpired in the instant action. The Middletown city commission adopted eight pieces of legislation over a five year period related to this road project, and all eight were passed as emergency measures. When the residents along the effected stretch of the road finally lost their fight to convince the city commission to stop the project, they took their case to the general electorate by the only means available to them; they proposed an ordinance which would repeal all of the legislation concerning the project. The city officials, however, continued to proceed with the project,

and even though the voters adopted the initiative ordinance, the project was fully completed and the contractor fully paid for its work.

Following full performance of the contract, the city officials sought to recover the local share of the cost of the contract by levying assessments against the property owners adjacent to the affected portion of the road. The city also sought to issue tax anticipation bonds to recover these funds in anticipation of the collection of the assessements over a twenty year period. Since the assessment legislation was part of the legislation repealed by the initiative ordinance, the city officals caused the instant action to be filed, prior to issuing the bonds, seeking to have the initiative ordinance declared unconstitutional.

In most cases involving a claimed impairment of contract, the obligee under the contract is the party seeking relief from legislation which allegedly impairs the contract. However, the instant case presents a situation where the obligee has received all that it was entitled to receive, but the obligor seeks relief from the legislation. This case presents the following elements which would make it an apt case for this Court to review and which have not been presented to this Court in any prior case:

(1) At the time this action was commenced, there was no outstanding contractual obligation, the benefit of which was denied to the party entitled to performance by reason of the initiative ordinance.

(2) The party who could have possibly complained of damage by reason of the initiative ordinance suffered no actual damage, but rather the city officials who are to serve the people are attempting to use the alleged contract impairment to justify their ignoring the will of the people.

(3) The terms of the contract between ODOT and the contractor provided that ODOT had the authority to terminate the contract at any time and to pay the contractor only for the work that it had actually performed under the contract. ODOT was involved in this project only as a conduit for the federal highway funds which were to be used to pay for 70-75% of the cost of the project and had no actual interest in the road improvement which involved only a city street.

(4) The initiative ordinance affected only the city's own contractual obligations and nothing in the ordinance in any way deprived the parties who had contracted with the city of any remedy to obtain the benefit of their bargain; i.e., the ordinance, at the most, amounted to only a breach of the city's contractual obligation.

In short, the judgment of the Supreme Court of Ohio represents a decision on a constitutional issue when the party claiming a constitutional violation was in no way harmed by the legislation. Furthermore, at the time the attack on the legislation was made, whatever injury might have occurred did not occur and the claim was moot. Finally, the judgment in this case represents an over extension of the contract clause to allow the servants of the people to ignore the expressed will of the people. For these reasons, the Court should review this judgment.

II. FIRST QUESTION PRESENTED FOR REVIEW.

Whether the courts should entertain a challenge by a city's elected officials to the constitutionality of an ordinance proposed by initiative petition and adopted by the electorate of the City, when the municipal corporation suffered no harm as a result of the ordinance and when, at the time the challenge was brought, any harm which might have occurred was moot?

This action was brought by the City, pursuant to a resolution of the city commission, under Revised Code Section 133.71(B). The purpose of the action was to attempt to validate securities it intended to issue in anticipation of the collection of special assessments the commission had levied regarding the Manchester Road project. The Complaint alleged that the City had fully complied with Chapter 727 of the Revised Code in levying the asessments. The Complaint further alleged that at the general election in November, 1981, the voters of the city of Middletown had adopted, by a vote of 5,230 to 3,406, the ordinance, which had been proposed by initiative petition and which is the subject of this action. Finally, the Complaint alleged that this ordinance was "beyond the power even of the electorate" to adopt. The City throughout these proceedings has basically contended that this initiated ordinance was unconstitutional as an impairment of the City's preexisting contractual obligations. The city, however, was not a proper party to raise this issue.

The state courts all held in this matter that this type of bond validation action was a special statutory action which "enlarges the standing of the city to bring up the impairment of contract issue." This finding is, however, erroneous.

A basic constitutional principle is that constitutional rights are personal and may not be asserted vicariously. *Broadrick* v. *Oklahoma*, 413 U.S. 601, 612 (1973). A plaintiff, when challenging legislation based upon a claimed denial of consitutional rights, must show that he himself is injured by the challenged action of the defendant. *Village of Arlington Heights* v. *Metropolitan Housing Corp.*, 429 U.S. 252, 261 (1977). These principles rest on more than principles of effective advocacy and judicial economy. They reflect the conviction that under our constitutional system courts are not roving commissions assigned to pass judgment on the validity of the Nation's laws. *Broadrick* v. *Oklahoma*, 413 U.S. at 611-12.

The state courts in the instant matter made no finding that Respondent had suffered any personal harm by reason of the initiated ordinances repeal of the prior legislation. Rather, the Ohio courts in the instant case found that the bond validation statute conferred standing on Respondent to raise this issue because the initiative ordinance was a part of the "proceedings taken in connection with the bonds" the city proposed to issue. Although standing is a judicial rule, legislation may "grant an express right of action to persons who otherwise would be barred by prudential standing rules." *Warth* v. *Seldin*, 422 U.S. 490, 501 (1975). Even though standing may be created by statute, "the Article III requirement remains: the plaintiff must allege a distinct and palpable injury to himself." *Id.* Even though a party may be a proper person to commence an action, its standing is limited to litigating its own rights. This rule is based upon the rule that courts should not unnecessarily adjudicate constitutional rights and that the holders of the constitutional rights may not wish to assert them or may be able to enjoy them in the absence

of litigation. *Singleton* v. *Wulff*, 428 U.S. 106, 113-4 (1976). Also, the third parties are generally best able to advance their rights. *Id.*

Even if the initiated ordinance might have impaired someone's existing contractual obligation, the city, as a municipal corporation, was in no way injured by the adoption of the initiated ordinance. The city government is the servant of the people, and is totally subject to their retained power and control. The city government derives its authority from its constituents who are incapable of unconstitutionally depriving themselves of any rights. Therefore, even though the city had authority by statute to commence the action, the courts should not have allowed it to contest the validity of the initiated ordinance by which it suffered no distinct and palpable injury to itself.

Additionally, even if the city were a proper party to raise the rights of the contractors in the contract, at the time this action was commenced, the contract had been performed in full and the contractor had received all of the compensation to which it was entitled. Even where a constitutional violation may have occurred, if circumstances have changed so that an actual case or controversy no longer exists, the issue becomes moot and is no longer justiciable unless it involves a wrong which is capable of repetition, yet evading review. *See, Board of School Commissioners* v. *Jacobs*, 420 U.S. 128, 129 (1975). Since this case involved one particular road project and one particular piece of legislation, the issue is not likely to repeat and is moot. The Ohio courts should not have decided the issue.

III. SECOND QUESTION PRESENTED FOR REVIEW

Whether an ordinance proposed by initiative petition, and adopted by a vote of the electors, which repeals all legislation and commitments of the city concerning a contract with the Ohio Department of Transportation for the city's cooperation in the widening and improving of a street within the municipality is merely a repudiation of the contract which fails to unconstitutionally impair the city's contractual obligations.

Even if the state courts should have considered the constitutional issue raised by the City, their judgment on that issue was erroneous in failing to distinguish between a municipal corporation's impairment of the obligations of a contract and a repudiatory breach of a contract to which the municipality is a party. While the former is unconstitutional, the latter is not.

The repudiation, or breach, by a municipal corporation of its obligations under a contract fails to rise to the level of a constitutional violation; to so hold would make every dispute involving the performance of a municipal contract a constitutional question. *Hays* v. *Port of Seattle*, 251 U.S. 233 (1920); *McCormick* v. *Oklahoma City*, 236 U.S. 657 (1915); *City of Dawson* v. *Columbia Avenue Saving Fund, Safe Deposit, Title and Trust Co.*, 197 U.S. 178 (1905); *St. Paul Gaslight Co.* v. *City of St. Paul*, 181 U.S. 142 (1901).

In *Hays*, the plaintiff had entered into a contract with the state of Washington for the improvement of a certain waterway. The plaintiff immediately began work, however a dispute arose concerning approval of plans for the remainder of the work. After a substantial delay in com-

pletion of the work, the state legislature passed legislation which abandoned the project and conveyed title of the subject land to the Port of Seattle, a separate political subdivision. When the plaintiff claimed that this statute impaired his contractual rights, the Court held that the statute merely repudiated or violated the contract, but did not impair it. The Court stated that the state's obligation under the contract remained the same and formed the measure of the plaintiff's right to recover from the state for the damages sustained, if any. 251 U.S. at 237.

In *McCormick*, the plaintiff had entered into a contract with the defendant city to perform certain road paving work. After the plaintiff had commenced performance, the city council passed an ordinance repudiating the contract. The plaintiff maintained that the city's actions would deprive him of performing the improvements specified in the contract and thereby deprived him of a property right without due process of law and impaired his contractual rights. The Supreme Court held that the Complaint alleged only a breach of the contract and failed to state a claim for an unconstitutional impairment of contract. 236 U.S. at 659.

The instant case is closely analogous to the *Hays* and the *McCormick* cases. The city of Middletown had entered into a contract agreeing to cooperate with the Ohio Department of Transportation (ODOT) in the improvement and widening of Manchester Road. Based upon this agreement, ODOT entered into a contract with a private construction company to perform the work. At the time the initiated ordinance was passed, the project was partially completed. This ordinance, however, failed in any way to impair the rights of either ODOT or the private contractor in these contracts. The initiated ordinance merely repealed the legislation

authorizing the contracts and thereby repudiated the city's obligations under them. Nothing in the ordinance foreclosed any avenue which either party might pursue to recover the benefit of their bargain. The holding of the Ohio courts essentially means that once a municipal corporation executes a contract, that contract is etched in stone and there is nothing the city can ever do to prevent performance of the contract. This holding stretches the constitutional prohibition against the impairment of the obligations of contract far beyond its intended scope.

Additionally, the private contractor in this case had no right to perform the contract, as the director of ODOT had the statutory and contractual right to "decrease or cancel the quantity of any item or portions of a contract" and to pay the contractor only for that portion of the work actually performed. *Ohio Rev. Code* sec. 5525.14. In other words, any contract with ODOT is subject to termination by the director upon written notice and the contractor has only a right to be paid for the work actually performed. *Conn Construction Co.* v. *Dept. of Transportation*, 14 Ohio App.3d 90, 96 (Franklin Co. 1983).

The city has also argued that it had a contractual obligation to impose the special assessments upon the property owners abutting on the improved portion of Manchester Road to pay the local share of the project costs. However, since the contractors in this case were looking to the general revenues of the city, and not a special fund created by the assessments, for payment, the city had the authority to alter its assessment plan, so long as the contractor received all that he was entitled to under the original contract. *See, City of El Paso* v. *Simmons*, 379 U.S. 497 (1965).

In summary, the adoption of the initiated ordinance

acted only as a repudiation of the city's commitments to the Manchester Road project and failed to deprive any person of any right to recover any losses sustained by reason of this repudiation. For this reason, the ordinance fell far short of impairing any of the city's existing contractual obligations in the constitutional sense. The voters' adoption of this legislation, therefore, was a valid exercise of their legislative power and should have been enforced by the Ohio courts.

CONCLUSION

The instant case involves two substantial constitutional questions. First, as a threshold consideration, is whether a municipal corporation may claim, in this type of proceeding, that an ordinance, proposed by initiative petition and adopted by the voters, is an unconstitutional impairment of the city's contractual obligations to third parties, even after the contractors have been paid in full for their performance. In this case, over a five year period, the city commission passed every piece of legislation related to the widening of Manchester Road as emergency legislation, for the purpose of preventing a referendum. Then, after the voters had passed an initiative ordinance to stop the project, the commission went to court and contended that the voters had unconstitutionally impaired the city's contractual obligations. To allow the city to proceed in this fashion would obliterate the initiative ordinance as a control which the electorate has retained over the city commission. An avenue would have been paved for the further abuse of legislative power by the city commission in the city of Middletown and the total emasculation of the people's retained legislative power.

The second constitutional issue presented in this case is whether the initiative ordinance was an impairment of any of the contractual obligations of the city of Middletown. Even assuming that this ordinance sought to stop this road widening project after the contract was executed, the voters had a right to do so. Such action would amount to nothing more than a breach of the city's contract and would leave the contracting parties the remedies which are available to any nonbreaching party to a contract. Since the ordinance failed to restrict the contracting parties' ability to obtain the benefit of

their bargain under the contract, there was no impairment of any contractual obligation.

For the foregoing reasons, Petitioners respectfully submit that the Ohio courts erroneously decided both of these substantial constitutional questions and that this Court should issue a writ of certiorari to the Supreme Court of Ohio for a review of its judgment.

Respectfully submitted,

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APPENDIX

CITY OF MIDDLETOWN, APPELLEE, *v.* FERGUSON, AUDITOR, ET AL.; STICKLEN ET AL., APPELLANTS.

[Cite as Middletown *v.* Ferguson (1986), ___ Ohio St. 3d ___.]

Municipal corporations—Streets and highways—Initiative repeal of road project-related legislation impairs obligation of contracts and is void, when—Section 10, Article I, U.S. Constitution—Bond validation action—Municipality granted standing, when—R.C. 133.71.

(No. 85-996—Decided July 23, 1986.)

APPEAL from the Court of Appeals for Butler County.

This cause concerns a dispute arising from the Manchester Road project in the city of Middletown ("city"), appellee herein. As early as 1963, the city first considered the widening and improvement of Manchester Road as part of its master plan for development. The city intended to upgrade the road from two lanes to a four-lane divided highway. Appellants herein are abutting property owners who opposed the Manchester Road project.

In 1975, the Ohio-Kentucky-Indiana Regional Counsel of Governments, an organization responsible for distributing federal highway improvement funds, resolved that federal monies would be allocated to improve Manchester Road.

The city's next step was to pass the necessary legislation. In May 1977, the city commissioners passed emergency Resolution No. R77-19, officially instructing the administration to proceed with the Manchester Road project. Detailed plans for the road improvement project were drawn up and presented to the Ohio Department

of Transportation ("ODOT"), which acted as contracting authority for the actual work and served as a conduit for federal funds.

ODOT did approve the project and thereafter, on May 2, 1978, the city commissioners passed emergency Ordinance No. 078-93 directing the city manager to enter into contracts with ODOT for the improvement project. The ordinance set forth the parties' contractual obligations. A certified copy of the ordinance was signed by a city representative on May 12, 1978 and by ODOT on June 2, 1978. As provided by the ordinance, the city agreed to bear the full cost of the project, less federal funds received, and to maintain the road after completion of the project. ODOT was to supervise construction of the improvement. The full text of this ordinance was published in the Middletown Journal.

At the time of passage of Ordinance No. 078-93, the estimated construction cost was $1,185,000. The city expected federal funds to cover about seventy percent of the costs of the project, while it would bear the remaining thirty percent. It has been stipulated by both parties to the instant case that "[f]rom the inception of the Project, the City planned to finance most of its share of the cost by special assessments to the benefiting owners of * * * private property bounding or abutting Manchester Road * * *."

On May 8, 1979, pursuant to the passage of Ordinance No. 079-19, two public hearings on the road improvement project were held. It is stipulated that owners of twenty-seven of the affected properties, including all of the appellants herein, attended one or another of the hearings. Appellants and other citizens expressed safety concerns about increased traffic on Manchester Road and concerns about the proposed assessments. City officials explained the assessment process and responded to

the safety concerns. The city then typed Summary Minutes and Recommendations from the meetings and mailed it to all affected property owners.

On January 20, 1981, the city commission adopted emergency Resolution No. R81-03, declaring the necessity to improve Manchester Road and stating that bonds should be issued in anticipation of the collection of assessments levied on affected property owners. A copy of this resolution was published in the Middletown Journal.

After enactment of the resolution, the city's director of public service prepared estimated assessments. Notice of the adoption of Resolution No. R81-03 and the estimated assessments were sent to all affected property owners. Five owners filed objections, which were resolved by the Assessment Equalization Board.

In March 1981, the city commission passed emergency Ordinance No. 081-44, stating its determination to proceed with the project and to levy the special assessments to pay the city's portion of the project's cost.

On June 9, 1981, several affected property owners filed with the clerk of the city commission a verified copy of an ordinance which they intended to make the subject of an initiative petition to be placed on the November ballot. The text of the proposed ordinance called for the repeal of "any and all further legislation" adopted by the city commissioners having reference to the widening and improvement of Manchester Road. The proposed ordinance also sought repeal of any and all commitments of the city of Middletown to the Manchester Road project.

While signatures for the initiative petition were being collected, on June 23, 1981, the city commission passed emergency Resolution No. R81-41 approving final plans for the project and appropriating approximately

$330,000 from its general fund representing the city's share of the project cost. This sum was paid to ODOT by the city and a formal contract between the parties was executed concurrently with the passage of the resolution.

Pursuant to the contract, ODOT apparently let bids for the construction phase of the project. On July 27, 1981, ODOT awarded a contract for the construction to SK Construction Company. Construction on the project commenced.

Meanwhile, on July 24, 1981, the Butler County Board of Elections validated sufficient signatures to have the initiative ordinance placed on the November ballot. At the November 3, 1981 general election, the voters approved the initiative ordinance, thus repealing "any and all" Manchester Road enabling legislation and any and all commitments of the city to the project. At the time of passage of the initiative ordinance, construction on the road widening and improvement was nearly sixty percent complete.

Although the effect of the initiative ordinance would have been to halt further construction on the project, the city believed the ordinance to be an unconstitutional impairment of an obligation of a contract and allowed construction to continue. The project was completed by July 1, 1982.

On June 7, 1983, in conformance with previously passed enabling legislation, the city commission enacted ordinances levying the special assessments and providing for the issuance of bonds by the city to pay for its portion of the construction costs. The bonds were to be retired by funds generated from the anticipated collection of assessments.

At that point, the salability of the bonds became an issue in light of the initiative ordinance and its possible

effect on the prerequisite enabling legislation for the levying of the assessments. The city then brought a bond validation action, pursuant to R.C. 133.71 *et seq.*, to establish its authority to issue the bonds and to establish that all of its previous resolutions and ordinances relating to the Manchester Road project were lawful and enforceable. Appellants, Judy F. Sticklen, James L. Deger, Mary S. Rice and Frederick H. Cranford, owners of property affected by the project, became named defendants to the action in an attempt to block assessments against their properties.

At trial, the city contended that the entire initiative ordinance was void *ab initio* as an unconstitutional impairment of the city's contractual obligations with ODOT for construction of the project. Appellants claimed that the city had no standing to sue. Appellants also argued that in the event that the portion of the initiative ordinance purporting to halt construction on the project was unconstitutional, that portion of the ordinance repealing assessments could be severed off and given full force and effect.

The trial court held (1) that the city had special statutory standing to bring its suit; (2) that the initiative's repeal of the assessment ordinance did not impair the city's contractual obligations; (3) that the primary aim of the initiative ordinance, to halt construction of the project, would have been an unconstitutional impairment of an obligation of a contract had construction been stopped; and (4) that the portion of the ordinance pertaining to assessments could not properly be severed from the portion of the ordinance halting construction. Therefore, the trial court decided that the entire initiative ordinance was unconstitutional and thus void. In its judgment entry of April 10, 1984, the trial court held that the city had the authority to issue its

bonds and that all proceedings taken by the city in connection with the Manchester Road project were lawful and valid.

The court of appeals affirmed. It reasoned that the initiative ordinance did impair the city's then-existing contractual obligations with ODOT on the effective date of its passage by the voters and that the ordinance was therefore void *ab initio*.

The cause is now before this court pursuant to the allowance of a motion to certify the record.

Squire, Sanders & Dempsey, John R. Gall, C. Craig Woods; and *Sheldon A. Strand*, law director, for appellee.

Carl Morgenstern Co., L.P.A., Carl Morgenstern and *Roger S. Gates*, for appellants.

Per Curiam. In this case the elected representatives of the citizens of Middletown, the city commissioners, carefully conceived a plan to widen and improve Manchester Road. The commissioners diligently and openly passed all necessary legislation to carry their plan to completion. Unfortunately, a significant number of citizens were opposed to the road improvement project. These citizens sought to halt the project by using their reserved initiative power. In this conflict between a city government and its citizens, we must decide whether the initiative ordinance passed by the Middletown voters unconstitutionally impaired the city's contractual obligations in the road improvement project.

We realize that initiative repeal of the necessary project-related legislation was the only course open to the citizens opposing the project.[1] Nevertheless, had this

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[1] Since the resolutions and ordinances relating to the Manchester Road project were passed as an emergency, the voters did not have the referendum option, but rather had to file an initiative petition in order to repeal the laws. See *Wiegand* v. *Ferguson* (1931), 124 Ohio St. 73.

initiative been brought at an earlier time, before there was an executed contract, and before construction had begun, this controversy likely would not be before us today. As it is, however, we must conclude that this initiative ordinance impaired the obligations of the contract between the city and ODOT in violation of Section 10, Article I of the United States Constitution and was thus void as of its effective date.[2]

Before we explain our reasons for this determination, we must first address the appellants' contention that the city has no standing to raise the issue of the constitutionality of the initiative ordinance. Appellants claim the city has no standing because its rights have not been adversely affected by the ordinance. Appellants argue that the city government is the servant of the people and derives its authority from its constituents who are incapable of unconstitutionally depriving themselves of any rights. Since the city government and the people are one, appellants reason, action by the voters cannot harm the city and thus the city has no "personal stake" in this controversy.

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[2] The initiative ordinance read in pertinent part as follows:

"An ordinance to repeal any and all legislation enacted by the City Commission of Middletown, Ohio with respect to the widening and improvement of Manchester Road from Breiel Boulevard east to the Butler/Warren County line including Resolution No. R81-03 and Ordinance Nos. 081-44 and 081-49 of the City of Middletown."

"Be it ordained by the people of Middletown, Ohio:

"*Section I.* That Resolution No. R81-03 and Ordinance Nos. 081-44 and 081-49 and, in addition, any and all further legislation not herein specifically designated by number but adopted by the City Commissioners of Middletown, Ohio and having reference to the widening and improvement of Manchester Road from Breiel Boulevard east to the Butler/Warren County line, be and hereby are, repealed.

"*Section II.* That any and all commitments of the City of Middletown, Ohio to widen and improve Manchester Road from Breiel Boulevard east to the Butler/Warren County line be, and hereby are, repealed.

"*Section III.* That this Ordinance shall take effect and be in force from and after the earliest date allowed by law."

We believe that appellants have overlooked the fact that standing may also be conferred by statute. The city has brought a bond validation action pursuant to R.C. 133.71(B), which provides that such actions may be commenced by an issuer of bonds "for the purpose of obtaining an adjudication of its authority to issue the securities and the validity of the proceedings taken * * * in connection therewith * * *." Further, R.C. 133.72 requires that the petition for validation contain the ordinance, resolution or other proceeding authorizing the issuance of the securities and all other essential proceedings taken in connection therewith. Surely the city's ordinances of June 7, 1983 levying the special assessments and providing for the issuance of bonds in anticipation of the collection of the assessments were essential proceedings taken in connection with these securities. It is the validity of these proceedings which the city seeks to adjudicate. The bonds cannot be issued if, as appellants contend, the initiative ordinance repealed all necessary legislation relating to the levying and collection of assessments. Accordingly, the constitutionality of the initiative ordinance is vital to a determination of whether the city has authority to issue the bonds.

Standing does not flow from the common law "personal stake" doctrine alone. As the United States Supreme Court has recognized, standing may also be conferred by a specific statutory grant of authority:

"Whether a party has a sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy is what has traditionally been referred to as the question of standing to sue. Where the party does not rely on any specific statute authorizing invocation of the judicial process, the question of standing depends on whether the party has alleged * * * a 'per-

sonal stake in the outcome of the controversy' [citation omitted] * * *. Where, however, * * * [a legislative authority] has * * * provided by statute for judicial review * * *, the inquiry as to standing must begin with a determination of whether the statute in question authorizes review at the behest of the plaintiff." *Sierra Club* v. *Morton* (1972), 405 U.S. 727, 731-732.

We think it clear that R.C. 133.71(B) authorizes judicial review, at the behest of the city, of the validity of all proceedings taken in connection with the bonds it proposes to issue and the city's authority to do so. We therefore hold that the city has standing in this case pursuant to a special statutory grant of authority.

We now address the city's contention that the initiative ordinance was void *ab initio* by reason of its unconstitutionality. Section 10, Article I mandates that "[n]o State shall * * * pass any * * * Law impairing the Obligation of Contracts * * *." This prohibition reaches any form of legislative action, including direct action by the people. *Ross* v. *Oregon* (1913), 227 U.S. 150, 163. This point was well made by the Ninth Circuit Court of Appeals in *Continental Illinois Natl. Bank* v. *Washington* (1983), 696 F. 2d 692. In this case, Washington voters who were concerned about huge cost overruns in the construction of nuclear power plants passed Initiative 394. The initiative provided, *inter alia*, that bonds could not be issued to finance further construction unless authority for the issuance was first obtained through an election. The builder of several nuclear power plants was the Washington Public Power Supply System, a municipal corporation. The court held that the initiative impermissibly impaired the builder's obligations under Section 10, Article I, and stated:

"Once having granted certain powers to a municipal corporation, which in turn enters into binding contracts

with third parties who have relied on the existence of those powers, the legislature *(or here, the electorate)* is not free to alter the corporation's ability to perform." (Emphasis added.) *Id.* at 700.

The Ninth Circuit's reasoning is equally applicable to the instant case, in which the city had entered into a binding contract with ODOT. Once the contract had been executed and performance begun, the voters of the city of Middletown were not free to impair the city's contractual obligations on the contract in violation of Section 10, Article I.

Appellants contend, however, that no impairment of an obligation of a contract resulted from passage of the initiative ordinance. Rather, they argue, the ordinance merely operated as a repudiation of the contract and no constitutional claim was thereby stated. This contention is misplaced. The distinction between a breach of contract and an impairment of an obligation of a contract was succinctly stated in *E & E Hauling, Inc.* v. *Forest Preserve Dist. of DuPage County* (C.A. 7, 1980), 613 F. 2d 675, 678:

"Mere refusal to perform a contract by a state does not raise a constitutional issue, but when a state uses its *legislative authority* to impair a contract a constitutional claim is stated." (Emphasis added.) See, also, Hale, The Supreme Court and the Contract Clause (1944), 57 Harv. L. Rev. 852, 891.

In the instant case, contravening legislation (the initiative ordinance) was enacted which sought to prevent the parties to this contract from meeting their obligations by repealing the contract. There could be no remedy in damages for a breach of a contract which no longer existed. As explained by the Seventh Circuit in *Forest Preserve Dist., supra*:

"* * * [I]f a state or its subdivision passes a law and

through enforcement of it prevents another party from fulfilling its obligation under the contract because the use of the ordinance precludes a damage remedy, the non-breaching party cannot be made whole. Instead, the law has impaired the obligation of the contract. Use of law normally will preclude a recovery of damages because the law will be a defense to a suit seeking damages * * *." *Id.* at 679.

In the case before us, the voters of Middletown used their reserved power to pass legislation in an attempt to prevent the city from fulfilling its contract. Here, a *law* was used to impair contractual rights. This initiative ordinance went beyond a mere breach of contract because its passage precluded any remedy in damages. Instead, had it been given effect, the ordinance would have brought about an impairment of the obligations of the contract between the city and ODOT.

It must now be determined whether that impairment was unconstitutional. We begin with the recognition that "[a]lthough the Contract Clause appears literally to proscribe 'any' impairment, * * * 'the prohibition is not an absolute one and is not to be read with literal exactness like a mathematical formula.' " *United States Trust Co.* v. *New Jersey* (1977), 431 U.S. 1, 21 (quoting *Home Building & Loan Assn.* v. *Blaisdell* [1934], 290 U.S. 398, 428). The first step in our analysis is to ascertain whether, in fact, this initiative ordinance "operated as a *substantial* impairment of a contractual relationship." (Emphasis added.) *Allied Structural Steel Co.* v. *Spannaus* (1978), 438 U.S. 234, 244. If the impairment is severe, the level of scrutiny of the law will be greater, as a substantial impairment of the obligations of a contract is more likely to offend the Contract Clause. *Id.* at 245.

Two considerations in determining whether the impairment is substantial are pertinent to the instant case.

The first is the extent to which reasonable expectations in the contract are disrupted. *Energy Reserves Group, Inc.* v. *Kansas Power & Light Co.* (1983), 459 U.S. 400, 411; *Allied Structural Steel Co., supra*, at 245-247; *United States Trust Co., supra*, at 31. Secondly, the United States Supreme Court has indicated that an impairment is especially severe where a party has relied on an obligation which is impaired by legislation, as when the legislation impairs the express terms of a contract. *Allied Structural Steel Co., supra*, at 246-247.

One of the effects of the initiative ordinance in the instant case was to repeal all legislation necessary for the city to levy assessments. The city urges that this amounted to substantial impairment. We agree.

The record demonstrates that the assessments were an integral part of the road improvement project. The resolutions and ordinances relating to assessments had been passed at the time the city signed the construction contract with ODOT. It is well-settled that " 'laws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it, as if they were expressly referred to or incorporated in its terms. * * *' " *Blaisdell, supra*, at 429-430 (quoting *Von Hoffman* v. *Quincy* [1867], 71 U.S. [4 Wall.] 535, 550). Accord *Farmers & Merchants Bank of Monroe* v. *Federal Reserve Bank of Richmond* (1923), 262 U.S. 643, 660. As explained by the Supreme Court, "[t]his principle presumes that contracting parties adopt the terms of their bargain in reliance on the law in effect at the time the agreement is reached." *United States Trust Co., supra*, at 20, fn. 17. Accordingly, the city's construction contract with ODOT incorporated the assessment legislation.

From the inception of this project, the city intended to recoup its share of the project costs by issuing bonds in

anticipation of the collection of assessments. The city passed this assessment legislation in order that its general revenues would not be depleted. The city undertook its contractual obligations on the premise that a specific source of revenue would be available by law to fund them. Passage of the initiative ordinance then simply repealed the legislation necessary to levy the assessments without even proposing an alternative source of funds from which to replenish lost general revenues. The city thus could not issue bonds in anticipation of the collection of assessments and could not recover its costs from the very source of funds upon which it had relied when entering the contract with ODOT. Such a result entirely frustrated the city's reasonable expectations and thus substantially impaired the city's contract with ODOT. See *Energy Reserves Group, Inc., supra*, at 411.[3]

The primary thrust of this initiative ordinance, however, was to halt construction of the road improvement. Had the initiative ordinance been given effect when construction was still in progress, the express terms of the city's contract with ODOT would obviously have been impaired because the bargained-for completion of the project would have been impossible. See *Allied Structural Steel Co., supra*, at 246-247. The parties' contractual obligations would have been abrogated. It is difficult to imagine a more substantial impairment of

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[3] Our holding certainly does not mean that cities cannot explore new, unforeseen or alternative methods of raising revenue to replenish their general funds or retire bonds. It is essential that cities retain the flexibility to change sources of funding through subsequent legislative enactments, initiative or otherwise, so long as their contractual obligations are not impaired thereby.

However, once a city has committed itself to a particular method of raising revenue and has entered into a contract in reliance on that method, that source of funding may not be subsequently eliminated by the electorate in a manner which would impair the city's contractual obligations.

the obligations of the contract than the one which would have resulted from this ordinance.

Our finding that this initiative ordinance substantially impaired the obligations of this contract is not the end of our analysis, however. The United States Supreme Court has been careful to consider the effect of the Contract Clause on the constitutional reservation of power to the states. As the court stated in *El Paso* v. *Simmons* (1965), 379 U.S. 497, 508, citing *Blaisdell*, *supra*, at 434-435:

" 'Not only are existing laws read into contracts in order to fix obligations between the parties, but the reservation of the essential attributes of sovereign power is also read into contracts as a postulate of the legal order. * * * This principle of harmonizing the constitutional prohibition with the necessary residuum of state power has had progressive recognition in the decisions of this Court.' "

In the context of the instant case then, we must attempt to harmonize the proscription of the Contract Clause with the important initiative powers reserved to the citizens of Middletown.

It has previously been determined that the initiative ordinance substantially impaired the obligations of the contract between the city and ODOT. The level of scrutiny of this ordinance will be high because of the severity of the impairment. *Allied Structural Steel Co.*, *supra*, at 245. Our inquiry must now move to the justification for this impairment. A law substantially impairing the obligations of a contract "may be constitutional if it is reasonable and necessary to serve an important public purpose." *United States Trust Co.*, *supra*, at 25. In *Blaisdell*, *supra*, the court upheld a law which did work an impairment because the law "was not for the mere advantage of particular individuals but for the protection of a basic interest of society." *Id.* at 445. The

standard "when distilled to its essence is one of reasonableness * * *." *Cuyahoga Metro. Housing Auth.* v. *Cleveland* (N.D. Ohio 1972), 342 F. Supp. 250, 254.

An examination of the record shows that a major reason advanced for passage of this initiative ordinance was citizen concern about traffic safety. Another reason was opposition to assessments. The city, at public meetings with these citizens, suggested several concrete measures to meet these problems. This initiative ordinance, which purported simply to abolish the road improvement project altogether, was neither a reasonable nor a necessary means of dealing with traffic safety concerns. It was, rather, the most drastic means of addressing the safety problems. Further, this ordinance sought to prevent any assessments on the abutting property owners and instead transferred the burden of the project's costs to the city taxpayers as a whole. As such, the ordinance operated "to the mere advantage of particular individuals," the abutting property owners, appellants herein. This initiative ordinance "did not effect simply a temporary alteration of the contractual relationships of those within its coverage, but worked a severe, permanent, and immediate change in those relationships — irrevocably and retroactively." *Allied Structural Steel Co., supra*, at 250. Even given the importance of the reserved power of initiative, there was not sufficient justification for this ordinance to survive challenge under the Contract Clause."[4]

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[4] Clearly, the right of the electorate to enact or repeal legislation by way of initiative petition is a precious and fundamental one. We only hold today that the initiative power must be exercised in a manner which does not interfere with the important protections embodied in Section 10, Article I of the United States Constitution prohibiting the impairment of the obligation of contracts. The words of this court, in a case decided ninety years ago, eloquently provide the foundation of our holding:

Our task has been to determine the constitutionality of this initiative ordinance. Because the ordinance was unconstitutional at the time of its passage, it was void from its inception. The passage of time and subsequent performance of the contract cannot "cure" this constitutional defect, for an unconstitutional law must be treated as having no effect whatsoever from the date of its enactment. This fundamental proposition has been expressed as follows:

"An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed." *Norton* v. *Shelby County* (1886), 118 U.S. 425, 442. Accord *Ex Parte Siebold* (1879), 100 U.S. 371, 376; *Chicago, I. & L. Ry. Co.* v. *Hackett* (1913), 228 U.S. 559, 566.

Accordingly, we hold that this initiative ordinance was void *ab initio* and affirm the judgment of the court of appeals that the city has authority to issue its bonds and that all proceedings taken in connection therewith were lawful and valid.

Judgment affirmed.

CELEBREZZE, C.J., SWEENEY, LOCHER, HOLMES and C. BROWN, JJ., concur.

DOUGLAS and WRIGHT, JJ., dissent.

"But, it is urged, that a majority of those voting on the subject, voted in favor of the improvement of the roads in Athens county under this act, and that the majority should rule. The answer is, that the majority must rule inside of the provision of the constitution, and the act being unconstitutional, the vote could not make that lawful, which under the constitution is unlawful." *Hixon* v. *Burson* (1896), 54 Ohio St. 470, 486.

Similarly, in the instant case, the electorate had no constitutional right to enact unconstitutional legislation by way of initiative petition.

CLIFFORD F. BROWN, J., concurring. I concur in the thorough and accurate analysis in the *per curiam* opinion of the rights of the parties. No member of this court will disagree, I am sure, that the people of a municipality have the right to exercise their state constitutional power to enact laws by the vote of the people through the initiative petition process as provided by Section 2, Article I of the Ohio Constitution, and implemented by R.C. 731.28. The *per curiam* opinion, however, clearly and correctly concludes that the state constitutional right of the people to exercise legislative power by the initiative petition process must in this case be compatible with Section 10, Article I of the federal Constitution which mandates that no state shall pass any law impairing the obligation of contracts. Such mandated prohibition refers to any form of legislative action including direct action by the people through the initiative petition process. *Ross* v. *Oregon* (1913), 227 U.S. 150, 163. This painstaking analysis in the *per curiam* opinion, relying as it does on a principle set forth by the United States Supreme Court in *Ross*, compels the result we reach here in favor of the city of Middletown. The necessary and logical result should be plain enough even for a first-year law student to understand. See footnote 4 of the *per curiam* opinion herein.

However, one dissenting opinion here fails or refuses to comprehend this simple, correct and just analysis. It proceeds with typical populist-insulting vituperation, for which its author is practiced and proficient, italicizing the word "people" five times, to state that what the Chief Justice and today's majority "fail to understand is that the right to vote becomes meaningless when the government is left free to ignore election results." There can be only one ulterior purpose for such diatribe. This invective and pure balderdash is phrased in a most

clever and grandstanding manner. Such dissenter hopes to have his judicial nonsense excerpted and editorialized in newspapers to heap adulation upon his pretended great reverence for the Ohio and United States Constitutions at the expense of other members of this court. Only a poison pen would write such a castigating dissent. This desperate grasp for undeserved attention adds nothing to the ship of Ohio jurisprudence but, instead, is an unsightly barnacle attached to it. It demonstrates an absence of judicial temperament exacerbated by judicial immaturity and inexperience.

Every member of this court has as much, and perhaps more, respect for "the sanctity of the ballot," "our democratic form of government," and "the sacred right to vote" as does the acerbic dissenter. Some of us developed this reverence for the sanctity of the ballot, for the First Amendment to the United States Constitution, and for Section 2, Article I of the Ohio Constitution, long before this distempered, dyspeptic dissenting justice became a lawyer.

DOUGLAS, J., dissenting. Between May 1977 and June 1981, the city commission enacted various measures to widen Manchester Road. Construction began sometime after July 1981. In November 1981, the people of Middletown passed the following initiative ordinance by a vote of 5,230 (60.6 percent) to 3,406 (39.4 percent):

"An ordinance to repeal any and all legislation enacted by the City Commission of Middletown, Ohio with respect to the widening and improvement of Manchester Road * * *

"* * *

"*Section I.* That Resolution No. R81-03 and Ordinance Nos. 081-44 and 081-49 and, in addition, any and all further legislation not herein specifically

designated by number but adopted by the City Commissioners of Middletown, Ohio and having reference to the widening and improvement of Manchester Road * * * be and hereby are, repealed.

"*Section II.* That any and all commitments of the City of Middletown, Ohio to widen and improve Manchester Road * * * be, and hereby are, repealed.

"*Section III.* That this Ordinance shall take effect and be in force from and after the earliest date allowed by law."

The initiative ordinance took effect on November 10, 1981 and the parties stipulated that almost sixty percent of the construction work had been completed by that date. In July 1982, the project was completed. On June 7, 1983, the city commission adopted legislation authorizing the levying of special assessments, and providing for the issuance of bonds to pay for the city's portion of the Manchester Road construction costs.

The First Amendment to the United States Constitution states, "Congress shall make no law respecting * * * the right of the people * * * to petition the government for a redress of grievances."[5] This right is "* * * among the most precious of the liberties safeguarded by the Bill of Rights." *United Mine Workers of America* v. *Illinois State Bar Assn.* (1967), 389 U.S. 217, 222. In Ohio, this important right is reinforced by Section 2, Article I of the Ohio Constitution. It states:

"All political power is inherent in the people. Government is instituted for their equal protection and benefit, and they have the right to alter, reform, or abolish the same, whenever they may deem it necessary * * *."

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[5] The Supreme Court has held this provision applicable to the states by virtue of the Due Process Clause of the Fourteenth Amendment. See, *e.g.*, *Hague* v. *Commt. for Indus. Organization* (1939), 307 U.S. 496.

One manner by which the people can exercise their First Amendment and Section 2, Article I powers is through the election process. Consistent with this philosophy, the General Assembly enacted R.C. 731.28. It states that ordinances providing for the exercise of certain governmental powers may be proposed by initiative petition, and that a properly proposed ordinance shall be submitted to the people for a vote.

The Supreme Court has testified to the fundamental character of the right to vote:

"No right is more precious in a free country than that of having a voice in the election * * * [process]. Other rights, even the most basic, are illusory if the right to vote is undermined." *Wesberry* v. *Sanders* (1964), 376 U.S. 1, 17.

A number of commentators have echoed this sentiment. Just recently, for instance, Chief Justice Celebrezze properly labeled the right to vote as "basic and fundamental." *State, ex rel. Keefe,* v. *Eyrich* (1986), 22 Ohio St. 3d 164, 179 (Celebrezze, C.J., dissenting).[6] I would respectfully suggest that the right to vote becomes meaningless when the government is left free to ignore election results.

The *people* of Middletown have exercised their "basic and fundamental" right to express their political preference in a free and honest election. Now that the *people* have expressed themselves, their choice should be honored. The majority's decision to ignore the *people's* choice defiles the sanctity of the ballot and is contrary to our democratic form of government.

The court should honor the *people's* decision. If contracts are breached as the result of that decision, any in-

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[6] In *State, ex rel. Keefe,* the court upheld a provision of Ohio's Modern Courts Amendment which was adopted by Ohio's voters in 1968.

jured parties can recover their damages through an appropriate lawsuit.

The majority of this court, in the name of constitutional adjudication, has constructed serious obstacles between the *people*, their sacred right to vote and their right to have their votes honored.

WRIGHT, J., dissenting. While I agree that the right of the people to petition the government for a redress of grievances and the right to vote are among the most precious of liberties safeguarded by the Bill of Rights and the Ohio Constitution, the record in this case demonstrates beyond any doubt that the issues raised in this case are moot. It is axiomatic that the exercise of judicial power is limited to actual "justiciable matters." (Section 4, Article IV, Constitution.) We are precluded by law from adjudicating hypothetical and speculative questions; the dispute must consist of specific adverse claims based upon present rather than speculative facts.[7] Accordingly, a court should not decide a question that by a change in circumstances has become moot.

The controversy sought to be raised by the city regarding the impairment of contract has been rendered moot by the full performance of the contract on which the city bases its contention. On November 10, 1981, when the initiative ordinance went into effect, it is undisputed that the construction project to improve and widen Manchester Road was approximately sixty percent com-

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[7] See *United States* v. *Raines* (1960), 362 U.S. 17; *Alabama Power Co.* v. *Ickes* (1938), 302 U.S. 464; *Hicklin* v. *Coney* (1933), 290 U.S. 169; *Bandini Petroleum Co.* v. *Superior Court* (1931), 284 U.S. 8; *Gulf Publishing Co.* v. *Lee* (C.A. 5, 1982), 679 F. 2d 44; *Garden State Bar Assn.* v. *Middlesex County Ethics Commt.* (C.A. 3, 1981), 651 F. 2d 154; *Stratman* v. *Watt* (C.A. 9, 1981), 656 F. 2d 1321; *Sannon* v. *United States* (C.A. 5, 1980), 631 F. 2d 1247.

pleted. To preserve its cause of action, the city should have immediately filed a declaratory judgment action to determine the constitutionality of the initiative ordinance. Instead, the city brought its complaint after it had already paid for the completion of the construction work. None of the city's obligations nor any of the obligations of the Ohio Department of Transportation under the construction contract was in fact impaired. The city has failed to allege that any specific individual has been denied any rights granted under the contract as a result of the initiative ordinance. To the extent that a justiciable controversy may have existed while the contract was in effect, the record reveals no individual in this litigation who suffered injury as a result of the adopted ordinance and, therefore, the city has no standing to continue litigation on this issue. I would affirm the trial court's finding that the city was not impaired in any of its obligations and dismiss this case as moot.

Accordingly, I dissent.

DOUGLAS, J., concurs in the foregoing dissenting opinion.

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
BUTLER COUNTY

Case No. CA84-04-049

CITY OF MIDDLETOWN,
Plaintiff-Appellee,

vs.

THOMAS E. FERGUSON, et al.,
Defendants-Appellants.

OPINION
(Filed April 29, 1985)

Sheldon A. Strand, Director of Law, City of Middletown, One City Centre Plaza, Middletown, Ohio 45042, and John R. Gall, Squire, Sanders & Dempsey, 155 East Broad Street, Columbus, Ohio 43215, for Plaintiff-Appellee.

Carl Morgenstern and Roger Gates, Carl Morgenstern Co., L.P.A., 604 First National Bank Building, Hamilton, Ohio 45011, for Defendants-Appellants.

JONES, J.

On July 12, 1983, plaintiff-appellee, the city of Middletown, filed a complaint for the validation of securities pursuant to R.C. 133.71 *et seq.* in the Court of Common Pleas of Butler County. The complaint sought a validation of municipal bonds which the city intended to issue as payment for the city's financial obligation on a municipal development project which widened Manchester Road from a two-lane rural highway to a five-

lane divided highway between Breiel Boulevard and the eastern boundary of the municipal corporation. The bonds issued by the city were then to be retired through special assessments levied against the owners of property bounding or abutting that portion of Manchester Road which had been developed.

A bench trial was held on August 16, 1983. Most of the evidence was submitted via a joint stipulation of facts and designation of exhibits. In addition, the trial court also heard testimony from Richard Goecke, the Director of Public Services for the city of Middletown, and defendant-appellant, James Deger, a Middletown resident who lived on Manchester Road and whose property abutted the portion of Manchester Road subject to the improvement.

The record indicates that the improvement of Manchester Road was a project suggested by the city's 1963 master development plan. In 1975, the Ohio-Kentucky-Indiana Regional Council of Governments ("OKI"), an agency responsible for the distribution of federal highway funds, gave its approval to the allocation of money for the Manchester Road project. Thereafter, the city began preliminary work on the project involving the appraisal of property, negotiations, and acquisitions of necessary portions of Manchester Road. On May 10, 1977, the Middletown City Commission passed Resolution R77-19, which directed the city to begin the process leading to the improvement of Manchester Road. On May 2, 1978, the city commission adopted Ordinance 078-93, wherein the city was authorized to enter a contract with the Ohio Department of Transportation ("ODOT"). ODOT was to perform the actual construction work on the project. Included within the ordinance were provisions providing for the city to pay 100% of the cost of the project less any federal funds determine to

be eligible and available for participation in the project. The city also agreed to assume responsibility for the maintenance and operation of the project upon its completion. The parties stipulated that in 1978 the estimated cost of the project was $1,185,000, of which 70% would be paid for by federal funds with the remaining 30% to be contributed by the city. It was further stipulated that from the inception of the project the city had always intended to fund its share of the cost by levying special assessments to the benefiting owners of the property bounding or abutting the portion of Manchester Road subject to the improvement.

In February 1979, the city commission adopted an ordinance authorizing the city to conduct public hearings on the project in cooperation with OKI. On April 16, 1979, the city sent written notice to the property owners on Manchester Road informing them that public meetings concerning the project would be held on May 8. It was stipulated that the individual property owners who are appellants in this case attended at least one of the public meetings on May 8 along with the owners or representatives of 23 of the other pieces of property that were affected by the project.[1] A summary report of the questions and concerns raised at the meeting was mailed to the Manchester Road property owners in October 1979.

Middletown City Commission passed Resolution R81-3 on January 20, 1981. The resolution, *inter alia*, declared that it was necessary to go forward with the project on Manchester Road and that the improvement

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[1] Only four owners of Manchester Road property affected by the widening project have appealed the judgment of the trial court: James Deger, Judy Sticklen, Mary Rice and Frederick Cranford. The stipulation of facts indicates that the assessments were levied against "fifty pieces of private property" on Manchester Road.

was conducive to the public health, convenience and welfare of the city and its inhabitants. The resolution also provided that the city's cost of the project would be met by assessments levied upon the property lots bordering Manchester Road within the boundaries of the improvement. The resolution also directed the director of public services to prepare estimated assessments to be filed with the clerk of the city commission and thereafter to serve the estimated assessments on the assessed property owners. It was stipulated by the parties that notice of these assessments were sent to the property owners pursuant to R.C. 727.13 and that five of the owners filed written objections to the assessments levied against their respective properties. An assessment equalization board was appointed by the city commission to hear all timely written objections to the estimated assessments. A report filed by the board and adopted by the commission found that the estimated assessments were equitably distributed among the assessed parcels.

On March 10, 1981, Ordinance 081-44 was adopted by the city commission declaring the city's decision to proceed with the improvement project and to pay the costs of the construction by the estimated assessments which had been theretofore prepared and approved by the assessment equalization board and adopted by the city commission. Approximately a month later, the city commission adopted Ordinance 081-49, which was essentially the same as the earlier Ordinance 078-93 with the exception of some cost saving measures, authorizing a contract between the city and ODOT for the construction of the improvement to Manchester Road.

Resolution R81-41, adopted on June 23, 1981, approved the final plans and arrangements for the project and also included the appropriation of $332,355 to be paid to ODOT which represented the city's share of the

construction cost. On that same date, the actual contract for the improvement project was executed between the city and ODOT. On July 21, 1981, ODOT opened sealed construction bids which it had earlier let for the construction phase of the project and awarded a contract to SK Construction Company on July 27. Thereafter, the actual construction of the project commenced in due course.

Meanwhile, on June 9, 1981, a copy of a proposed initiative ordinance was filed with the clerk of the city commission. The full title and text of the proposed initiative ordinance read as follows:

> "AN ORDINANCE TO REPEAL ANY AND ALL LEGISLATION ENACTED BY THE CITY COMMISSION OF MIDDLETOWN, OHIO WITH RESPECT TO THE WIDENING AND IMPROVEMENT OF MANCHESTER ROAD FROM BREIEL BOULEVARD EAST TO THE BUTLER/WARREN COUNTY LINE INCLUDING RESOLUTION NO. R81-03 AND ORDINANCE NOS. 081-44 AND 081-49 OF THE CITY OF MIDDLETOWN
>
> "BE IT ORDAINED BY THE PEOPLE OF MIDDLETOWN, OHIO:
>
> "**Section I.** That Resolution No. R81-03 and Ordinance Nos. 081-44 and 081-49 and, in addition, any and all further legislation not herein specifically designated by number but adopted by the City Commissioners of Middletown, Ohio and having reference to the widening and improvement of Manchester Road from Breiel Boulevard east to the Butler/Warren County line, be and hereby are, repealed.

"**Section II.** That any and all commitments of the City of Middletown, Ohio to widen and improve Manchester Road from Breiel Boulevard east to the Butler/Warren County line be, and hereby are, repealed.

"**Section III.** That this Ordinance shall take effect and be in force from and after the earliest date allowed by law."

On July 17, 1981, appellant Deger filed several initiative petitions with the city calling for a vote on the proposed initiative ordinance at the next regular election on November 3, 1981, to determine whether to enact the ordinance. The required number of signatures on the initiative petitions were validated by the board of elections on July 24, 1981, and the initiative ordinance was placed on the ballot for the November election. On November 3, 1981, the citizens of Middletown, by a tally of 5,230 to 3,406, voted to adopt the initiative ordinance. The initiative ordinance went into effect on November 10, 1981. The parties stipulated that the day before the initiative ordinance went into effect, 59.6% of the construction phase was completed. It was further sitpulated that work continued on the project under the belief that the electorate could not vote to repeal those ordinances dealing with the project since such would be tantamount to an impairment of the city's contractual obligations. By July 1, 1982, the project was 100% completed.

On June 7, 1983, the city adopted ordinances authorizing the levying of the special assessments against the property owners to cover the city's portion of the construction cost and to issue bonds to pay the property owners' portion in anticipation of the collection of the special assessments. The adoption of these ordinances, in

light of the initiative ordinance adopted by the voters of Middletown, prompted the city's complaint seeking a determination of its authority to issue the bonds as well as the levying of the special assessments.

During the proceedings below, the city argued, *inter alia*, that the initiative ordinance was unconstitutional since its effect of repealing earlier legislation would impair the city's contractual obligations with ODOT for the construction of the improvement project. Appellants claim that the initiative ordinance does not impair the city's contractual relationships, and that the city did not even have the standing to raise the constitutionality of the initiative ordinance in general and the impairment of contract issue in particular.

In a lengthy and exhaustive opinion, the trial court decided a number of issues and questions raised by the parties. In those issues relevant to this appeal, the court first held that the city had standing to contest the constitutionality of the initiative ordinance as a result of the special statutory standing given to the city per R.C. 133.71. In addition, the court held that the initiative repeal of the assessment ordinances did not impair any contractual relations or obligations between the city and ODOT, since the contractor had been paid in full before the assessments were levied and that the effect of repealing the assessment ordinances only acted to transfer the funding of the project from the special assessments to the general fund of the city. Finally, the trial court determined that even thought the initiative ordinance did not act as an impairment of any contractual obligations, the aim of the ordinance was to terminate the entire project, including the construction and levying of assessments, and that had the ordinance actually halted the construction on the project such would have amounted to an unconstitutional impairment of contractual obligations.

The court went on to find that it would have been fatal to the initiative ordinance's objective to separate or sever that portion of the ordinance which pertained to the construction phase of the project, since the portion of the ordinance concerning the assessment legislation could not be read separately and stand alone. As a result, the court determined that the initiative ordinance did not meet the constitutional test of severability and concluded that the ordinance was unconstitutional. Judgment was entered on behalf of the city which held that the initiative ordinance was unconstitutional and that the city had the authority to issue the bonds and that the actions and proceedings taken by the city in connection with the project to widen and improve Manchester Road, including the special assessments, were lawful and valid in all respects. Appellants timely invoked the jurisdiction of this court and have asserted the following assignments of error:

First Assignment of Error

> "The trial court erred in finding that the plaintiff-appellee had standing to contest the constitutionality of the initiated ordinance."

Second Assignment of Error

> "If the constitutional question was properly before the court, the trial court erred by finding the initiated ordinance was unconstitutional and by validating the securities."

In their first assignment of error, appellants claim that the trial court erred in determining that appellee had the standing to contest the constitutionality of the initiative ordinance. Appellants argue that the city has not been injured by the adoption of the initiative ordinance and that the statutory basis upon which the suit

was based does not confer upon a potentional issuer of securities the authority to raise an issue it could not otherwise raise.

The suit was brought by appellee pursuant to R.C. 133.71 *et seq.* R.C. 133.71(B) provides in pertinent part that:

> "An issuer, prior to the issuance of any particular issue of securities which it proposes to issue may file a petition for validation and thereby commence an action *for the purpose of obtaining an adjudication of its authority to issue the securities and the validity of the proceedings taken and proposed to be taken in connection therewith,* including but not limited to any assessments of taxes levied or to be levied, and the lien of such taxes, the levy of rates, charges, or tolls, and proceedings or other remedies for the collections of such taxes, rates, charges, or tolls. * * *" (Emphasis added.)

R.C. 133.71(B) not only permits an issuer of securities to commence an action for an adjudication of its authority to issue such securities,. but also enables an issuer to seek an adjudication of any "proceedings" taken in connection with the issuance of the securities or proposed to be taken in connection therewith. The statute does not specify the meaning or definition of the term "proceedings" as used within R.C. 133.71, but R.C. 133.72 states that the petition for validation must contain, *inter alia*, "* * * the ordinance, resolution, or other act or *proceeding* authorizing the issuance of the securities and the adoption thereof, [and] all other *essential proceedings* taken and proposed to be taken in connection therewith * * *." (Emphasis added.) Ordinance 083-56, which authorized the issuance of the bonds, specifically stated that it was necessary to issue the bonds

in anticipation of the collection of the special assessments which had already been levied. The initiative ordinace adopted by the electorate provided that "any and all further legislation" adopted by the city commission referring to the widening and improvement of Manchester Road was to be repealed. Not only did the initiative ordinance attempt to repeal the municipal legislation in effect at the time the initiative ordinance was adopted, but also any future legislation adopted by the city, which would include those ordinances adopted on June 7, 1983, providing for the levying of the special assessments and the issuance of the bonds. For purposes of a validation action initiated pursuant to R.C. 133.71, the ordinance authorizing the special assessments as well as the initiative ordinance purporting to repeal and negate the assessment ordinance would be "essential proceedings" taken in connection with Ordinace 083-56 authorizing the bonds, since the issuance of the bonds and their subsequent retirement are directly dependent upon the validity of the assessments. Accordingly, the validity and constitutionality of the initiative ordinance are vital to a determination of whether appellee has the authority to issue the bonds.

Furthermore, in *Hamilton County* v. *Cloud* (C.P. 1967), 42 O.O. 2d 171, affirmed (1968), 13 Ohio St. 2d 63, the court pointed out that one of the purposes of the validation of securities statutes was to make securities more salable and to avoid a multiplicity of suits contesting the validity of the issuance of securities. If appellee was only permitted to obtain an adjudication of whether it had the authority to issue the bonds in the case at bar, it would obviously have to institute an additional lawsuit in order to contest the constitutionality of the initiative ordinance. By allowing the city to raise the issue of the ordinance's constitutionality in the case at

bar, the possibility of multiple lawsuits is avoided and all questions relevant to the issuance of the bonds may be disposed of in a collective action.

Finally, we reject appellants' argument that appellee is required to demonstrate an injury before it can raise the question of the initiative ordinance's constitutionality. The Court of Appeals for Franklin County held in *State, ex rel. Consumers League of Ohio* v. *Ratchford* (1982), 8 Ohio App. 3d 420, 424, that:

> "The common-law doctrine of standing to sue involves a determination of whether a party has a sufficient stake in the outcome of a justiciable controversy to obtain a judicial resolution of that controversy. * * *
>
> "* * * Standing requires demonstration of a concrete injury in fact, rather than an abstract or suspected injury. Demonstration of injury in fact is limited to those situations where an individual can show he has suffered or will suffer a specific injury, even if slight, from the challenged action or inaction, and that this injury is likely to be redressed if the court invalidates the action or inaction."

As noted, the requisite demonstration of injury in fact is an element of common law standing. In the matter *sub judice*, appellee's standing is based not on common law principles, but rather on a specific statutory section granting appellee the standing to bring the action currently under consideration. We agree with the reasoning of the trial court that R.C. 133.71 provides appellee with the specific statutory standing to contest the constitutionality of the initiative ordinance since the initiative ordinance purportedly repealed the assessments levied against the Manchester Road residents and the

validity of issuing the bonds could not be determined unless it was first decided whether the assessments themselves were valid.

Accordingly, for the reasons stated above, we find that the first assignment of error is not well-taken and we hereby overrule the same.

For their second assignment of error, appellants contend that if the constitutionality of the initiative ordinance was properly before the trial court, the court committed error in finding the ordinance to be unconstitutional. Appellants take the position that since the trial court found that the initiated legislation did not impair any of the city's existing contractual obligations, it was improper for the trial court to find the ordinance unconstitutional as there was no basis for such a finding. On the other hand, the city contends that the trial court, although correct in finding the initiative ordinance to be unconstitutional, was wrong in holding that the ordinance did not act to impair the city's contractual obligations.[2]

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[2] Appellants argue that the city is precluded from contesting the trial court's determination that the initiative ordinance did not impair the city's contractual obligation since the city failed to file a cross-appeal. R.C. 2502.22 permits an appellee who has not filed a notice of appeal to file assignments of error only for the limited purpose of preventing the reversal of the judgment under review. *Duracote Corp.* v. *Goodyear Tire & Rubber Co.* (1983), 2 Ohio St. 3d 160; *Loewenstine* v. *Delta Air Lines, Inc.* (1982), 7 Ohio App. 3d 185. Although the city, as the appellee in the case at bar, has not filed any "assignments of error," the city can nevertheless contest the reasoning behind the trial court's judgment even though it agrees with the judgment of the trial court. The city argued the impairment of contract issue in the court below and we hold that it may raise the same question on appeal even though it agrees with the trial court's judgment, since an appellee is entitled to put forth any argument in support of the trial court's judgment which was advanced below. *Easy Living* v. *Whitehead* (1979), 65 Ohio App. 2d 206. There is no need for the city to file a cross-appeal when it is not attacking the trial court's judgment, but only asserting a legal proposition previously advanced and rejected at the trial court level which it now offers in support of the judgment rendered below.

Both the United States and Ohio Constitutions prohibit the state from enacting any legislation impairing the obligation of contracts. Section 10, Article I, United States Constitution; Section 28, Article II, Ohio Constitution. The contract clause limits the power of the state to modify its own contracts as well as to regulate those between private parties. *United States Trust Co.* v. *New Jersey* (1977), 431 U.S. 1, 97 S.Ct. 1505. Consequently, "[n]o state, much less a municipality within a state, may pass any law impairing the obligation of contracts, including contracts of its own." *Haught* v. *Dayton* (1972), 32 Ohio App. 2d 133, 136, reversed on other grounds (1973), 34 Ohio St. 2d 32.

Although the language of the contract clause is unequivocal, the provisions and limitations it imposes are not absolute and must be accommodated to the state's inherent police power to promote the public welfare. *Energy Reserves Group, Inc.* v. *Kansas Power & Light Co.* (1983), 459 U.S. 400, 103 S.Ct. 697; *Minnesota Association of Health Care Facilities* v. *Minnesota Dept. of Public Welfare* (C.A.8, 1984), 742 F.2d 442, certiorari denied (1985), ____ U.S. ____, 105 S.Ct. 1191. Thus, the language of the contract clause will not "* * * be read with literal exactness like a mathematical formula." *Home Building & Loan Association* v. *Blaisdell* (1934), 290 U.S. 398, 428, 54 S.Ct. 231, 236.

The threshold question and inquiry in a contractual impairment case is whether the state or municipal law has in fact, operated as a substantial impairment of a contractual relationship. *Allied Structural Steel Co.* v. *Spannaus* (1978), 438 U.S. 234, 98 S.Ct. 2716; *Energy Reserves Group, supra.* It has also been held that the severity of the impairment will increase the level of scrutiny to which the legislation will be subjected. *Allied Structural Steel, supra; Energy Reserves Group, supra.* In addition, the total destruction of contractual expecta-

tions is not necessary for a finding of substantial impairment. *United States Trust Co., supra.* One consideration in determining whether the impairment is substantial is the extent to which reasonable expectations under the contract are disrupted. *Minnesota Association of Health Care Facilities, supra.*

The trial court found that since the contractor had been paid in full and the work on the widening project had been completed, the initiative ordinance did not impair the city's obligations under its construction contract. The trial court, however, looks at the status of the legislation after the project was completed and the contractor was paid in full. The contractor was paid out of the city's general fund and the construction phase of the project was completed despite the adoption of the initiative ordinance which went into effect at a time when the construction was little more than halfway completed. Nothing in the text of the initiative ordinance indicates that it was adopted by the electorate of Middletown pursuant to the municipality's inherent police power to promote the public welfare. To the contrary, the legislation adopted by the city commission indicates that the improvement project was undertaken to promote the public welfare of the city and its citizens. Had the initiative ordinance been followed when it became effective as a matter of law, there is no doubt that its enforcement would not only impair the city's contractual obligations, but, according to Section II of the ordinance, would have completely abrogated the city's obligations and responsibilities under its construction contract with ODOT. Such a repudiation and abandonment of the improvement project would not merely impair the city's contractual obligations but would thoroughly eliminate them. ODOT's reasonable expectations under the contract would have been disrupted to

the point where the contractual impairment would not only have been substantial but absolute as well. Considering the objective of the initiative ordinance and its substantial impact upon the then existing contractual obligations of appellee at the time the ordinance went into effect, we hold that the initiative ordinance operated as a substantial impairment of appellee's contractual relationship, and accordingly, is unconstitutional for that reason.

Even if we were to agree with the trial court's conclusion that the initiative ordinance did not impair the city's contractual obligations and was not unconstitutional for that reason, we nevertheless would agree with the trial court's determination that the ordinance is unconstitutional because it fails to meet the severability test. In its opinion, the trial court found that in adopting the initiative ordinance, the Middletown voters not only acted to repeal municipal legislation pertaining to the levying and collection of the assessments, which, in the trial court's view, would have been permissible, but acted to repeal the entire improvement project. The thrust of the initiative legislation was to stop the entire project, including the actual construction and widening of Manchester Road. Any legislative action which would have stopped the construction would have been an unconstitutional impairment of contract. The trial court concluded that this unconstitutional objective could not be accomplished and also found that this unconstitutional objective could not be severed from that portion of the ordinance repealing the assessments levied by the city.

When two provisions of a statute or ordinance are distinct and one part may stand separate from the other, the unconstitutional portion of the statute may be severed, and the constitutional part permitted to stand

alone. *Champlin Refining Co.* v. *Corporation Commission* (1932), 286 U.S. 210, 52 S.Ct. 559; *Record Revolution No. 6, Inc.* v. *City of Parma* (N.D. Ohio 1980), 492 F.Supp. 1157, reversed (C.A.6 1980) 638 F.2d 916, vacated and remanded (1981), 451 U.S. 1013, 101 S.Ct. 2998, (1982), 456 U.S. 968, 102 S.Ct. 2227, affirmed on remand (C.A.6 1983), 709 F.2d 534. In determining whether the legislation shall be allowed to stand, the court must find, that standing alone, legal effect can be given to those parts which are constitutional, and that the legislature intended the statute to be severable. *Dorchy* v. *Kansas* (1924), 264 U.S. 286, 44 S.Ct. 323. Thus, the question of whether various parts of a legislative scheme are severable involves a determination of legislative intent. *Akron Center for Reproductive Health, Inc.* v. *City of Akron* (N.D. Ohio 1979), 479 F.Supp. 1172, affirmed in part and reversed in part (C.A.6 1981), 651 F.2d 1198, affirmed in part and reversed in part (1983), 462 U.S. 416, 103 S.Ct. 2481. Unless it is evident that the legislative body would not have enacted those provisions which it is empowered to do, independent of those provisions which it has no power to enact, the invalid part may be severed and dropped if what remains is fully operative as a law. *I.N.S.* v. *Chadha* (1983), ____ U.S. ____, 103 S.Ct. 2764; *Buckley* v. *Valeo* (1976), 424 U.S. 1, 108, 96 S.Ct. 612, 677; and *Champlin Refining Co., supra.* The Ohio Supreme Court stated the following in *Emmons* v. *Keller* (1970), 21 Ohio St. 2d 48, overruled on other grounds (1974), 38 Ohio St. 2d 268, (1975), 41 Ohio St. 2d 120, paragraph three of the syllabus:

> "One part of a statute may be invalid for want of conformity to the Constitution without affecting the validity of the remainder of the statute, where the invaiid part may be stricken and is not in its nature

> and connection so essential to the remainder of the statute or so related to the general purpose of its enactment as to warrant the conclusion that the General Assembly would have refused to adopt the statute with the invalid part thereof stricken therefrom."

See, also, *Fleischman* v. *Flowers* (1971), 25 Ohio St. 2d 131.

Furthermore, in *Livingston* v. *Clawson* (1982), 2 Ohio App. 3d 173, 177, it was held that:

> "It is a general rule of law that if an unconstitutional part of an Act is stricken, and if that which remains is complete in and of itself, and capable of being executed in accordance with the apparent legislative intent, wholly independent of that which is rejected, the remaining part must be sustained."

The court then goes on to quote the series of tests for determining the issues of severability or inseverability as set forth by the Ohio Supreme Court in *Geiger* v. *Geiger* (1927), 117 Ohio St. 451, 466:

> " '(1) Are the constitutional and the unconstitutional parts capable of separation so that each may be read and may stand by itself? (2) Is the unconstitutional part so connected with the general scope of the whole as to make it impossible to give effect to the apparent intention of the Legislature if the clause or part is stricken out? (3) Is the insertion of words or terms necessary in order to separate the constitutional part from the unconstitutional part, and to give effect of the former only?' "

As previously stated, a question of legislative severability includes an ascertainment of legislative in-

tent. *Akron Center for Reproductive Health, Inc., supra.* In determining the legislative intent of a law or statute, courts look to the language employed and the purpose to be accomplished by the legislation. *Featzka* v. *Millcraft Paper* (1980), 62 Ohio St. 2d 245; *Henry* v. *Central Natl. Bank* (1968), 16 Ohio St. 2d 16. The intent of a statute or ordinance is primarily determined from the language of the legislation itself. *Stewart* v. *Trumbull County Bd. of Elections* (1973), 34 Ohio St. 2d 129. Consequently, in determining the scope and intent of a law, one is to look first to the language of the law. See, *Henry T. Patterson Trust by Reeves Banking & Trust Co.* v. *United States* (C.A.6 1984), 729 F.2d 1089. Those words should be given their plain and ordinary meaning, unless the legislative intent indicates otherwise. *Ohio Assn. of Public School Emp.* v. *Twin Valley Local School Dist. Bd. of Educ.* (1983), 6 Ohio St. 3d 178.

In the initiative ordinance, three specifically designated pieces of legislation adopted by the Middletown City Commission were repealed. In addition, the ordinance provided that "any and all further legislation" concerning the Manchester Road improvement project was to be repealed. The ordinance also contained language purporting to repeal "any and all commitments" of the city pertaining to the project. " 'Any' is a word of flexible meaning, and must be interpreted in the light of the context. In construing statutes the word 'any' is equivalent and has the force of 'every' or 'all'." *Motor Cargo, Inc.* v. *Bd. of Twp. Trustees* (C.P. 1953), 67 Ohio Law Abs. 315, 320. "Any" and "all" as used in a legislative context designate objects in a general manner without pointing out any one in particular. *Motor Cargo, supra.*

The plain and ordinary meaning of the words used in the initiative ordinance indicates that the intent of the

ordinance was to repeal all legislation adopted by the city concerning the improvement project and to repeal any and all commitments or obligations of the municipality arising therefrom. A reading of the ordinance's title also suggests such a legislative purpose. See, *e.g.*, *Laufman* v. *Oakley Building & Loan Co.* (S.C. Ohio 1976), 408 F.Supp. 489, (A law's title is one indication of its legislative intent.).

Furthermore, from the exhibits submitted by the parties, specifically the report of the public hearing conducted on May 8, 1979, it is apparent that one of the purposes behind the initiative ordinance was to halt the actual construction of the project since most of the concerns voiced at the public hearing were directed to safety, the speed of traffic on Manchester Road, access to schools on Manchester Road, and truck traffic. Only minimal concern was expressed over the assessments at the public hearing. It is clear that one objective of the drafters of the initiative ordinance and of the Middletown electorate was to stop the actual construction of the project. Clearly, as mentioned above, such would be an unconstitutional impairment of the city's contractual obligations. Consequently, that portion of the ordinance directed to enjoining the construction was unconstitutional.

Applying the principles and tests concerning the severability question set forth above, we must now decide whether the constitutional or permissive portion of the ordinance (that repealing the assessments) can be executed in accordance with the apparent legislative intent independent of the unconstitutional portion (prohibiting and repealing the construction of the improvements). It is clear that the ordinance is drafted in such a way as to repeal "* * * any and all * * * legislation * * * having reference to the widening and im-

provement of Manchester Road * * *." The avowed purpose of the initiative ordinance was to stop the project *in toto*, including the actual widening and improvement of Manchester Road as well as the levying of the assessments. The ordinance also lacked a "savings clause," the use of which would have indicated an intention that if part of the ordinance was found to be unconstitutional, the remainder could stand alone. We find that the unconstitutional portion of the ordinance is so inextricably related to the general scope of the legislation and is so essential to the remainder of the ordinance and its general purpose that the electorate of Middletown would have refused to adopt the ordinance with the invalid portion restricting the actual construction stricken and deleted therefrom. See, *e.g.*, *South Euclid Fraternal Order of Police* v. *D'Amico* (1983), 13 Ohio App. 3d 46, (Severing of unconstitutional portion of ordinance which is related to other parts would render the remainder of the ordinance useless).

Accordingly, we find that the constitutional portion of the initiative ordinance cannot be severed and stand independent of the unconstitutional portion abrogating the construction phase of the project. We therefore find that appellants' second assignment of error is not well-taken and that the judgment of the lower court is hereby affirmed.

Judgment affirmed.

KOEHLER, P.J., and COFFMAN, J., concur.

Coffman, J., of the Court of Common Pleas Fayette County, sitting by assignment.

IN THE COURT OF COMMON PLEAS
BUTLER COUNTY, OHIO

Case No. CV83-07-0772

CITY OF MIDDLETOWN,

Plaintiff,

vs.

THOMAS E. FERGUSON, Auditor, et al.

Defendants.

OPINION
January 25, 1984
(Filed March 1, 1984)

MOSER, J.

This action was filed by the City of Middletown pursuant to O.R.C. 133.71 *et seq.*

In mid 1982, the City of Middletown, Ohio, and the Ohio Department of Transportation finished a construction phase of an extensive project to widen and improve a portion of Manchester Road in Middletown, Ohio.

In November 1981, when the construction phase was already half finished, the electors of the City passed an ordinance, which several property owners along Manchester Road had gotten onto the ballot by initiative petition, purporting to repeal "any and all" of the enabling legislation and contracts by which the City had undertaken to implement the project.

The City now files this action seeking a declaration from this Court that such ordinance unconstitutionally impaired the existing contractural obligations of the City with respect to the project and has, therefore, no force and effect. This action was necessitated by the City of

Middletown for the reason that it now wishes to sell bonds for the payment of this project which will be retired through assessments against the property owners benefitting from the improvements along Manchester Road.

Certain property owners along Manchester Road have now objected to this assessment claiming that the initiated ordinance passed in November 1981, repealed the City's authority to make these assessments. It is now this Court's considered opinion that the City of Middletown has the authority to issue the securities described in its complaint upon the terms set forth therein, including the levying of the special assessments by the City which we declare to be lawful for the purposes set forth in said complaint.

The Court has come to the foregoing conclusion as a result of the resolution of numerous issues presented to the Court by the parties, and which issues and resolutions are set forth in this opinion.

Issue I: Should the City have suspended any building of the Manchester Road improvement until the voters voted on the initiated ordinance, especially since the City Commission had knowledge of the impending election on this issue before entering into the contract to construct the improvement.

The statutory and case law of Ohio distinguishes an initiative election from a referendum election. When a referendum petition under R.C. 731.21 is filed by the required number of voters within thirty days of the passage of an ordinance by a City Commission, the operation of the municipal ordinance is suspended until approved by the majority of those voting upon that particular ordinance in the next preceding election. On the other hand, the petition for an initiative election under R.C. 731.28 does not have to be filed within thirty days

of the passage of the ordinance, nor does it suspend the operation of the ordinance until the election.

There is precedential case law in Ohio which holds that the voters cannot obtain an injunction to prevent a municipality from contracting pursuant to an ordinance until a vote on a pending initiative petition has been taken. In *Wiegand* v. *Ferguson*, 124 Ohio St. 73 (1931), a taxpayer of the City of Lakewood sought to enjoin the City from entering into a contract to build an incinerator plant pursuant to an ordinance until the voters could vote on an initiative ordinance repealing that measure. The Supreme Court of Ohio interpreted the statutory language of the charter of the City of Lakewood to provide for a suspension of the ordinance only if the vote was upon a referendum petition, but not if on an initiative petition. The Charter of the City of Middletown provides that the state law will apply to the procedures to be followed when filing a referendum or initiative petition. As discussed above, the state law distinguishes between initiative and referendum just as the City of Lakewood's charter did in the *Wiegand* case. Therefore, since the ordinances passes relative to the Manchester Road improvement were all emergency ordinances which were not subject to referendum, the voters only had the option of an initiative petition to repeal them. Since the improvement ordinances were not suspended by the filing of the petition and their operation was not subject to an injunction, the City of Middletown was within its rights to make contracts authorized by the Manchester Road improvement ordinances. Under the law of Ohio the City did not legally have to stop work on the project pending the election. To hold otherwise, the mere filing of an initiative ordinance could virtually halt the operations of government.

Of course, the plaintiffs further contend that even the passage of the initiative ordinance itself could not interfere with any contract which had been entered into prior to the election on the theory that the voters were not permitted to impair any contractural obligations of the City.

ISSUE II: The next issue therefore, which we must face, is one which the defendants propose. It is their contention that the City of Middletown does not even have standing to bring up the impairment of contract issue.

This suit was brought by the City of Middletown to validate certain bonds to be funded by the collection of assessments on abutting property owners of the Manchester Road improvement. This suit was brought pursuant to the Ohio Validation of Securities Act (R.C. 133.71 — 133.80). Section 133.71(B) of that statute provides that an action may be commenced to obtain an adjudication of the validity of issuing securities. Part of this adjudication would include determining whether the assessments to pay off the securities are valid. The City claims that this statutory scheme gives it standing to sue and that it is not appropriate to apply the traditional tests of "standing" to this situation.

The defendants, Sticklen, Deger, Cranford and Rice, on the other hand, argue that the City of Middletown has no standing to raise the impairment of contract issue since it has not been harmed by the repeal of the ordinances in any way. Defendants claim that since the project has been completed and the contractors paid in full, the City has no right to complain that it has been harmed. Defendants also claim that the City's ability to carry out its maintenance responsibilities under the contract have not been effected, for the reason that there was no evidence of impairment of this responsibility in-

troduced at trial. Defendants further contend that plaintiff is not a proper party to contest the constitutionality of the repeal since the voters are, in effect, the City, and therefore cannot deprive themselves of anything.

All of these arguments, however, lose sight of the fact that this action was brought under a specific statutory procedure, and in this way enlarges the standing of the City to bring up the impairment of contract issue. The validity of issuing the bonds could not be determined unless it is first determined whether or not the assessments were valid themselves. Since the assessments were purportedly repealed by the voters, the Court must determine whether the repealing ordinance interfered with any of the City's preexisting contractural relations, thereby invalidating the repeal ordinance. Without this determination, the Court could not determine the validity of issuing the bonds. This is an important issue in determining the validity of the assessments and we find the City has standing to raise such issue in this rather unique kind of proceeding.

ISSUE III: We are now, therefore, required to determine under the issues raised by counsel whether the initiative repeal of the assessment ordinances did in fact impair any contract between the City of Middletown and the Ohio Department of Transportation (O.D.O.T.)?

The initiated ordinances in this case purported to repeal "any and all. . .legislation having reference to the widening and improvement of Manchester Road from Breiel Blvd. east to the Butler/Warren County Line". The proposed initiative ordinance identified three legislative enactments of the City of Middletown for repeal: Resolution No. R-81-03, and Ordinances 081-44, and 081-49. The evidence before the Court is that at the time the initiative passed, the project was sixty percent

completed and it was one hundred percent completed before this action was brought by the City to validate its bonds which were to be amortized by the assessments.

The contract which the City claims is impaired by the repeal of the assessment ordinance, was executed between the City and O.D.O.T. on June 23, 1981. This contract did not provide that the State of Ohio would be repaid from assessments levied on abutting property owners to the Manchester Road improvement, but that the City would pay the amount due ($332,355.00) upon the requisition of the Director of Transportation. The project was completed and these amounts were, in fact, paid to the State of Ohio from the general fund of the City of Middletown.

The first question the Court must answer then is whether the assessment ordinance was part of the contract between the City and O.D.O.T.

It is a settled principle of law that a contract contains, within its parameters, not only the written language of the contract documents, but also all legislation in effect at the time the contract is made. The Supreme Court of the United States stated:

> "Laws which subsist at the time and the place of the making of a contract, and where it is to be performed, entered into and form a part of it, as fully as if they had been expressly referred to or incorporated into its terms. The principle embraces alike those laws which effect its construction and those which effect its enforcement or discharge. *Farmers and Merchants Bank of Monroe, N.C.* v. *Federal Reserve Bank of Richmond, Virginia*, 262 U.S. 649, 660 (1923). See also 17 O. Jur. 3d, *Constitutional Law*, Section 579.

Thus, it would seem at first blush that the assessment

ordinances relating to the Manchester Road project were incorporated into the contract between O.D.O.T. and the City, and therefore the initiated ordinances consequently interfered with the operation of this contract, i.e., the payment of the contractor from the assessments.

However, in this case, the contractor has already been paid by the City, even before the assessments were made, and the state when entering the contract looked to the general credit of the City for payment rather than the assessment ordinance. The question thus becomes whether the City is entitled to pay for the project through a specific source of funds. In other words, is the City entitled to still make the assessments on abutting land owners even though the contractor has been paid and the assessment ordinance has been repealed? Is the City's contract impaired if it cannot make assessments pursuant to the original ordinances, or is this question moot because of the full performance of the contract? The resolution of these issues is novel in the State of Ohio, and very important to the manner in which the City operates and handles its financial matter. The City argues that it must be able to earmark future revenue to pay for a current project in order to stay financially solvent.

The City cites two Supreme Court of Ohio cases in support of its position that the contract has vested certain rights in the City to make the assessments on abutting land owners. In *Goodale* v. *Fennel*, 27 Ohio St. 426 (1875), the Supreme Court recognized the principle that the law in force when a contract is made "defines the rights and duties of the parties under it" *Id.* at 432. The contract in that case was between the City of Cincinnati and a contractor to make certain improvements on Oregon Street in Cincinnati. A clause in that contract provided that the contractor would be paid specifically

from an ordinance assessing abutting landowners to the improved street, and the City of Cincinnati would not be liable for any amounts except those chargeable to abutting landowners. In effect, the contractor waived his right to look to the general fund of the City for payment. Subsequently, a statute was passed in the legislature changing the permissible assessment on abutting landowners from fifty percent to twenty-five percent of the value of their land or lot. If the contractor could only collect twenty-five percent of the property value, he would be unable to collect everything due him under the contract. The Supreme Court decided that the law in effect at the time of the execution of the contract was controlling and the contractor could therefore recover a full fifty percent of the value of the abutting landowner's property in assessments. However, the distinction between the *Goodale* case and the case *sub judice* is that the contractor was able to look to the general fund of the City of Middletown for payment and not the assessments alone. In the *Goodale* case, the contractor's ability to collect part of their payment was completely impaired by the passage of the new statute; in the case *sub judice*, the contractor's ability to collect was not impaired by the passage of the initiated ordinance since the City has completely paid the contractor. Also, the contractor did not look specifically to the assessments for payment but could look to the general fund. In fact, the contractor was paid and has no further interest in whether the assessments are collected by the City.

The next case cited by the City in support of its position is *State ex rel, City of Youngstown* v. *Jones*, 136 Ohio St. 130 (1939). In the *Youngstown* case, a certain statute provided that counties could issue notes to be used for poor relief in anticipation of receiving certain

funds from the state paying off the principal and interest of these notes. In other words the County which was to receive the funds could issue bonds in anticipation of future revenues received from the state.

The factual pattern in the *Youngstown* case is somewhat similar to our case in that the City of Middletown too is arguing that it, in effect, "borrowed" funds from its general fund in anticipation of receiving future revenues, being the assessments on abutting landowners. The factual dissimilarities are: (1) The City actually paid the contractor from its general fund whereas Mahoning County in the *Youngstown* case had not yet retired its bonds and, (2) The state (O.D.O.T.) did not look to specific funds but to the general fund of the City of Middletown for payment under the contract, whereas Mahoning County looked specifically to the state funds to pay the principal and interest of its bonds.

Therefore, in the *Youngstown* case, the subsequent repeal of the statute appropriating these funds was an impairment of Mahoning County's contract with its bond holders because these bond holders in Mahoning County were looking to these specific funds for retirement of the bonds.

The Supreme Court rejected the argument that Mahoning County could raise these funds from other sources to retire the bonds, and in so doing found that such an arrangement would entirely shift the "burden of payment" on a different set of taxpayers. *Id.* at page 77. The City of Middletown seeks to use this argument, claiming that it made a contract with O.D.O.T. in contemplation of a certain method of payment under existing laws and that a right to that particular method of payment (via assessments) vests.

Of course, the City is correct in its contention that the repeal of the assessment ordinance shifts the burden of

payment to a different set of taxpayers, i.e., the entire taxpaying populace of Middletown rather than the abutting property owners on Manchester Road. However, it does not necessarily follow that there is an *ipso facto* impairment of contract. When the City of Middletown contracted for this road improvement the contractor could permissibly look to Middletown's general fund to collect payment. Therefore, the repeal of the ordinance of assessment does not in fact impair the performance of the contract either by the City or the contractor.

This is precisely the issue which the defendants rely upon. Can the city complain of an impairment of contract by repeal of the assessment ordinance when the contractor has already been paid from the general fund and that project is completed? The defendants are alleging that the impairment of contract issue is completely moot since all obligations have been completed. Notwithstanding, the City contends it has a vested right in the funding established by law at the time of the attempted repeal of the improvement ordinance.

In order to resolve this issue, let us hypothesize for a moment. Had the general assembly of the State of Ohio passed legislation in November 1981 depriving the City of its right to assess benefitted property owners, then it would have interferred with the City's vested right to fund the Manchester improvement through assessments. These vested rights would have been acquired on June 23, 1981, which was the execution date of the improvement contract whose financing was proposed by ordinance 81-03, passed January 20, 1981. This analogy is consistent with the *Goodale* and *Youngstown*, *supra*, decisions.

However, when the voters of Middletown attempted to repeal all ordinances pertaining to the Manchester Road improvement, they acted in the stead of the City

Commission and not as a third party such as the General Assembly found itself in the foregoing hypothesis and in the *Goodale* and *Youngstown* cases. An initiative placed before the voters, places the voters in the seat of the commission. When acting upon an initiative ordinance the voters are the *alter idem* of the City Commission.

Therefore the looming question which now appears to be before the Court is whether the City Commission itself could have in November 1981 changed the source of financing the Manchester Road improvements. The defendants would have us answer this in the affirmative, citing *Toledo* v. *Toledo*, 10 Ohio Dec. Rep. 574, in which the City Council did this very thing. In *Toledo*, the City was challenged by a taxpayer's suit which contended the City could not in the middle of a contract for improvements transfer a portion of the funding from an assessment against abutting landowners to the improvement, to the general tax duplicate. The Court held that council had full power to initially decide to pay all or any part of the cost from general revenues and therefore the amendment did not enlarge the liability to which the taxpayers were potentially subjected to in the first instance.

Let us further hypothesize. Assume the City Commission in November of 1981 attempted to repeal *all* ordinances relating to the Manchester Road improvement. As so ably argued by the plaintiff, the City could not do this to the extent that such repealing legislation impaired any existing contracts as such actions would be unconstitutional. However, wouldn't plaintiffs also agree that to the extent the City repealed legislation which *did not* impair any contractural commitments, that such legislation would be valid? (Except, perhaps for the issue of sev rability, which will be addressed by the Court below.) This is precisely what the voters did in Mid-

dletown when acting in the stead of the City Commission. They attempted to repeal the Manchester Road improvement legislation. The voters in making this decision did so under their *retained* legislative powers by way of initiative. This legislative power was retained when the voters adopted Article VI, Section 1, of the Charter of the City of Middletown which provides in part that the "initiative and referendum powers are reserved to the people of the City on all questions which the City Commission is authorized to control by legislative action. . ."

Therefore we are simply stating that if the City Council in the *Toledo* case *supra*, was able to effectively change the funding of road improvements in mid stream, then the voters under an initiative petition could do the same providing it did not impair any previous existing contract and also met the test of "severability". We do determine in the matter, *sub judice* that the voters in attempting to repeal the Manchester Road improvement ordinances did not impair any existing contracts by transferring the funding of the project from assessments to the abutting landowners to the general tax duplicate.

Before this Court reaches the dispositive issue of "severability" we must review one more contention relative to the impairment of contract issue.

ISSUE IV. Was there an impairment of the City's continuing contractual duty to maintain the Manchester Road improvement after completion of the project?

The City of Middletown also argues that since the contract contains maintenance as well as construction obligations, and the maintenance obligations will continue into the foreseeable future, the initiative ordinance interferred with part of the existing obligations. These obligations as stated in the contract are:

(a) Maintain the improvement in accordance with the provisions of the statutes relating thereto, and make ample financial and other provisions for such maintenance; and

(b) Maintain the right of way and keep it free of obstructions in a manner satisfactory to the State of Ohio. . . .

(c) Will place and maintain all traffic control devices. . .

(d) Regulate parking. . ."

As mentioned above, the initiative ordinance purported to repeal all commitments of the City of Middletown concerning the Manchester Road improvement. Therefore, it would appear that if we were to hold the initiated ordinance as valid we would also have to conclude the City has no obligation to maintain this improvement in the future.

If, in fact, the City would not have to maintain the improvement under the broad language of the initiative ordinance then it did indeed interfere with the maintenance obligation and thus did impair the contract. There is no evidence in this particular case that the City is not in fact responsible for the maintenance of the Manchester Road improvement irrespective of its obligation to do so under the initiative ordinance. This Court is certain that the City has a *responsibility* to maintain such improvement irrespective of its *obligation* by contract to do so. Plaintiffs remind us of the fact that an obligation under a contract does not have to be completely destroyed, and ". . .if the obligation of a contract is impaired, the degree of impairment is immaterial." 17 O.Jur. 3d, *Constitutional Law*, Section 585. Therefore any impairments of the rights and duties of the parties is impermissible and a violation of the Constitution.

The City of Middletown clearly contracted with O.D.O.T. to maintain the improvements. To that extent the initiative ordinance seems to impair the existing contract. However, the contract with the state requires Middletown maintain the improvement "in accordance with the provisions of statutes relating thereto" R.C. 723.01 requires the City, irrespective of any contract obligation, to keep its streets "open, in repair, and free from nuisance."

Therefore, whether the City Commission or the voters in its stead attempted to abrogate its obligations to maintain Manchester Road under the *contract*, such actions would have been in vain because of the pre-existing obligation under the *law*.

We therefore find the voters did not in fact impair any contractural obligations to maintain Manchester Road.

This now leads us to the final issue in this case which we find is dispositive of this litigation irrespective of the resolution on the foregoing issues; however, this Court has chosen nevertheless to resolve these foregoing issues for the sake of judicial economy in the event of an appeal.

ISSUE V. Are the unconstitutional provisions of the initiating ordinance severable from the constitutional portion of it?

The defendants, *sub judice* seem to take final refuge in the decision in *Toledo* v. *Toledo*, *supra*, contending that anythng the City Commission could do the voters could do by initiative. We would agree and had the voters of Middletown initiated an ordinance repealing the assessment and directing the payment of the improvements from the general fund we would concur — or if the voters would have simply repealed the assessment ordinance alone and left the payment of the improvements to the general fund by implication, we would again concur.

However, the voters of Middletown called for the repeal of Ordinance "81-03, 81-44, 81-49, and any and all. . .legislation. . .having reference to the widening and improvements of Manchester Road. . ." and a repeal of "any and all commitments of the city. . .to widen and improve Manchester Road. . .". The total thrust of this legislation was to stop the *entire* project.

The effect of such legislative action by the voters would be no different than if the City Commission itself had passed such legislation in November 1981.

Early in this opinion we concluded beyond a doubt that the repealing legislation offered by the voters had no effect upon the construction and completion of the Manchester Road improvements nor could it have had any effect upon it notwithstanding the fact that the project was 60% complete by the time the voters had acted. In addition, any legislative action in November 1981 which could have stopped construction would clearly have been an impairment of contract. If, in fact, the voters were not able to stop the project which was the main thrust of the legislation, we ask ourselves if the remaining portions of the legislation initiated in November 1981 can be implemented. Certainly we cannot give effect to the entire statute as intended by the voters, therefore we must determine whether or not the assessment portion of the repealing ordinance enacted by the voters can be severed from the remaining portion of the ordinance.

At common law, a presumption arises that the enacting authority (whether it be the City Commission or the voters) intends its legislation to be effective as an entirety. *State* v. *Graham*, 30 Ohio N.P. (N.S.) 387 (1933). *Sub judice*, we are confronted with conflicting legislation, i.e., the enabling legislation passed by the City Commission *vis a vis* the repealing legislation passed by the voters, therefore this Court must resolve those con-

flicts. For this purpose we look to R.C. 1.47 which provides:

> that: "In enacting a statute, it is presumed
> "(A) Compliance with the constitutions of the state and the United States is intended;
> "(B) The entire statute is intended to be effective;
> "(C) A just and reasonable result is intended;
> "(D) A result feasible of execution is intended."

In addition, the Ohio Supreme Court has set forth a test of severability as follows:

> " '(1) Are the constitutional and unconstitutional parts capable of separation so that each may be read and may stand by itself?
> '(2) Is the unconstitutional part so connected with the general scope of the whole as to make it impossible to give effect to the apparent intention of the legislature if a clause or part is stricken out?
> '(3) Is the insertion of words or terms necessary in order to separate the constitutional part from the unconstitutional part, and to give effect to the former only?' " *Geiger* v. *Geiger*, 117 Ohio St. 451, 466 (1927) (citing *State* v. *Bickford*, 28 N.D. 36, 147 N.W. 407).

The most important facet of the severability test is number (2) above: Can the legislation still comport with the intention of the enacting authority if the unconstitutional part is stricken out? We answer that question in the negative. Here the intention of the enacting authority, the people of the City of Middletown was determined from the words of the initiative ordinance itself. The proposed ordinance clearly and succinctly offered to stop

the Manchester Road improvement project. It called for the repeal of "any and all. . .legislation. . .having reference to the widening and improvement of Manchester Road from Breiel Boulevard east to the Butler/Warren County Line." There were literally no other descriptive words in it. This leads to the inescapable conclusion that the voters only intended to halt construction of the project improvements when they voted in favor of the ordinance. While there is no true legislative history from which to garner the intention of the drafters of this legislation we can nevertheless look to the public hearing which was conducted on the Manchester Road improvement on May 8, 1979 (Joint Exhibit #9). It is to be noted that most of the concerns over this project were directed to safety, speed of automobiles, access to the schools, trucks and noise therefrom. Only minimal concern was expressed over the assessments. In addition, the defendant James L. Deger, stated that when the initiative ordinance was drafted their only concern was to halt the project and that the assessments were not an issue. Moreover, defendant's Exhibit #1, which is a letter dated July 17, 1981, to the City from the defendant's prior counsel specifically sets out the purpose of the proposed ordinance is to permit the citizens of Middletown "to have the opportunity to vote upon the desirability and legality of the proposed widening at an election for that purpose." Therefore, it would appear that the drafters of the legislation and the electors intended to halt the project when they voted in favor of the ordinance on November 3, 1981. The voters have clearly failed to accomplish the thrust of the initiative ordinance. Having thus failed to accomplish the goal of the initiative ordinance, do we tell the electorate of Middletown that they have instead transferred the cost of the project from the abutting landowners to Man-

chester Road to the electors as a whole? We hardly think so. The electors did not vote on that issue, and they certainly cannot now be said to have intended such a result. If, in fact, the initiative ordinance could have stopped the project, then there were no costs to anyone; but since the project could not be stopped, the electorate certainly did not intend to transfer most of the costs from those who would be benefitted by the improvement to themselves. Such a conclusion would also be in direct conflict to Revised Code Section 1.47(B) and (D) which provides that in enacting a statute a just and reasonable result is intended, and further, a result feasible of execution is intended. See *Livingston* v. *Claussen*, 2 Ohio App. 3d 173 (1982) which is a rather recent Ohio decision on statutory construction.

Finally, the initiated ordinance as presented to the voters contained only a single proposal, that being whether to stop the project. It is not logical or feasible now to find that it contained separate parts which may be read separately and made to stand alone. Likewise, not only would this Court have to "insert. . .words or terms. . .in order to separate the constitutional part from the unconstitutional part, and to give effect to the former only", it would have to totally re-draft the ordinance. Such an exercise is far beyond the scope of permissible action contemplated or specified by *Geiger*. Removing language from the initiated ordinance which pertains to the construction phase of the project, while leaving language purporting to repeal the assessment enactments would do substantial violence to the electors express intentions regarding the matter.

We are thus constrained to reach the conclusion that the initiated ordinance passed by the voters of Middletown did not impair the obligations of any existing contracts; but nevertheless such ordinance does not meet

the constitutional test of severability, and on this basis alone we find the ordinance as passed by the voters of Middletown to be unconstitutional.

/s/ John R. Moser, Judge

cc: Carl Morgenstern
Sheldon Strand
John R. Gall

THE SUPREME COURT OF OHIO
COLUMBUS
1986 TERM
To wit: July 23, 1986

Case No. 85-996

City of Middletown,

Appellee,

v.

Thomas E. Ferguson, Auditor, et al.;
Judy F. Sticklen, et al.,

Appellants.

JUDGMENT ENTRY

APPEAL FROM THE COURT OF APPEALS

This cause, here on appeal from the Court of Appeals for Butler County, was considered in the manner prescribed by law. On consideration thereof, judgment of the Court of Appeals is affirmed for the reasons set forth in the opinion rendered herein.

It is further ordered that the appellee recover from the appellants its costs herein expended; and that a mandate be sent to the Court of Common Pleas to carry this judgment into execution; and that a copy of this entry be certified to the Court of Appeals for Butler County for entry.

/s/ FRANK D. CELEBREZZE
Chief Justice

[CERTIFICATION OMITTED]